Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

JAMES ERWIN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHERE SHERIFF'S DEPUTIES WHO LACKED A REASONABLE BASIS FOR CONTINUING PETITIONER'S WARRANTLESS DETENTION AFTER CLEARING THE INITIAL BASIS FOR THE STOP CONTINUED TO DETAIN HIM, WAS HIS PURPORTED CONSENT TO SEARCH HIS VEHICLE, GIVEN WHILE DETAINED, A DIRECT PRODUCT OF AN UNCONSTITUTIONAL DETENTION, AND SHOULD EVIDENCE SEIZED AS A RESULT OF THAT SEARCH HAVE BEEN SUPPRESSED?

II.

WHERE PETITIONER (1) ATTEMPTED TO WALK AWAY UPON BEING APPROACHED BY A DEPUTY SHERIFF, (2) REFUSED TO PROVIDE THE DEPUTY WITH THE VEHICLE'S TRUNK KEY AND (3) HAD HIDDEN THE TRUNK KEY IN HIS SOCK, WHERE THE DEPUTY ASSERTED TO PETITIONER, "THEN YOU DON'T MIND IF I LOOK AROUND IN THE CAR, THEN, DO YOU?", AND WHERE THE DEPUTY HAD TO POKE A HOLE IN THE PARTITION BETWEEN THE BACK SEAT AND THE TRUNK TO PULL SUSPECTED DRUGS OUT OF THE

TRUNK THROUGH THAT HOLE, WAS PETITIONER'S PURPORTED CONSENT TO SEARCH THE VEHICLE INVOLUNTARY?

III.

WHERE A CRIMINAL CASE IS PENDING BEFORE A MAGISTRATE JUDGE AFTER THE FILING OF A COMPLAINT AND PRIOR TO INDICTMENT, DO 28 USC §636 AND ED Mi LR 72.1 AUTHORIZE THE MAGISTRATE JUDGE TO CORRECT THE MISASSIGNMENT OF THE CASE, WITHOUT SPECIFIC REFERENCE FROM A DISTRICT JUDGE, WHERE THE GOVERNMENT DOES NOT OBJECT TO THE MAGISTRATE JUDGE'S CONSIDERATION OF THE MOTION AND THE RIGHT TO THE SUBSTANTIVE RELIEF IS CLEAR?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were the United States of America and James Erwin, Jr.

TABLE OF CONTENTS

Questions Presented for Review i

Parties to the Proceeding Below iii

Table of Contents iv

Table of Cited Authorities vii

Citation of Reports of Opinions
and Orders Entered Below 1

Statement of Jurisdiction 1

Constitutional Provisions,
Statutes and Rules Involved 1

Statement of the Case 2
Jurisdiction of the District Court 2
Case chronology 2
Statement of facts 2

Reasons for Granting the Writ 6

I. Where sheriff's deputies who lacked a reasonable basis for continuing Petitioner's warrantless detention after clearing the initial basis for the stop continued to detain him, was his purported consent to search his vehicle, given while detained, a direct product of an unconstitutional detention, and should evidence seized as a result of that search have been suppressed? 6

A. At the time of the purported consent, the deputies did not have reasonable cause to continue Petitioner's detention . . . 7

B. Once the initial basis for detention was resolved and in the absence of reasonable suspicion justifying further detention, the deputies were required to release Petitioner without further questioning 12

II. Where Petitioner (1) attempted to walk away upon being approached by a deputy sheriff, (2) refused to provide the deputy with the vehicle's trunk key and (3) had hidden the trunk key in his sock, where the deputy asserted to petitioner, "then you don't mind if I look around in the car, then, do you?", and where the deputy had to poke a hole in the partition between the back seat and the trunk to pull suspected drugs out of the trunk through that hole, was Petitioner's purported consent to search the vehicle involuntary? 18

III. Where a criminal case is pending before a magistrate judge after the filing of a complaint and prior to indictment, do 28 USC §636 and ED Mi LR 72.1 authorize the magistrate judge to correct the misassignment of

the case, without specific reference from a district judge, where the government does not object to the magistrate judge's consideration of the motion and the right to the substantive relief is clear? 23

Relief Requested 29

Appendix

Appendix A
September 17, 1998, Opinions of the United States Court of Appeals for the Sixth Circuit *en banc* 1a

Appendix B
March 6, 1996, Order of the United States Court of Appeals for the Sixth Circuit vacating panel decision and granting rehearing *en banc* . 22a

Appendix C
December 8, 1995, panel opinions, United States Court of Appeals for the Sixth Circuit . . 24a

Appendix D
February 4, 1994, Memorandum Opinion and Order of the District Court Denying Motion to Suppress 43a

Appendix E
August 31, 1993, Order of the Disrict Court Denying Motion to Correct Improper Assignment of Case 65a

Appendix F
28 USC §636 . . . . . 67a

Appendix G
ED Mi LR 72.1 . . . . . 75a

Appendix H
ED Mi LR 100.1 . . . . . 80a

Appendix I
ED Mi LR 200.1 . . . . . 82a

TABLE OF CITED AUTHORITIES

Cases:

Application of Tomich,
221 FSupp 500 (DMont 1963) 20

Brinegar v United States,
338 US 160, 69 SCt 1302,
93 LEd 1879 (1949) 15

Bumper v North Carolina,
391 US 543, 88 SCt 1788,
20 LEd2d 747 (1968) 19, 22

Coolidge v New Hampshire,
403 US 443, 81 SCt 2022,
29 LEd2d 564 (1971) 6, 14

Edmondson v International Playtex, Inc.,
678 FSupp 1571 (ND Ga 1987) 27

Elkins v United States,
364 US 206, 80 SCt 1437,
4 LEd2d 1669 (1960) 15, 21

Florida v Bostick,
501 US 429, 111 SCt 2382,
115 LEd2d 389 (1991) 22

Florida v Royer,
460 US 491, 103 SCt 1319,
75 LEd2d 229 (1983) 7, 8, 13, 16

Horton v California,
496 US 128, 110 SCt 2301,
110 LEd2d 112 (1990) 12

Jackson v United States,
353 F2d 862 (DC Cir 1965) 21

Katz v Molic,
128 FRD 35 (SD NY 1989) 28

Knowles v Iowa,
___ US ___, ___ SCt ___, ___ LEd2d ___
(1998) [1998 WL 840933] 13

Montana v Tomich,
332 F2d 987 (9th Cir 1964) 20

Ohio v Robinette,
519 US ___, 117 SCt 417,
136 LEd2d 347 (1996) 7, 16

Pennsylvania v Muniz,
496 US 582, 110 SCt 2638,
110 LEd2d 528 (1990) 22, 23

People v Bordine,
29 Mich App 112, 185 NW2d 164 (1970) 21

People v Kaigler,
368 Mich 281, 118 NW2d 406 (1962) 21, 22

Peretz v United States,
501 US 923, 111 SCt 2661,
115 LEd2d 808 (1991) 25, 27

Reid v Georgia,
448 US 438,441, 100 SCt 2752,
65 LEd2d 890 (1980) 9

Schneckloth v Bustamonte,
412 US 218, 93 SCt 2041,
36 LEd2d 854 (1973) 18, 19, 22, 23

Sibron v New York,
392 US 40, 88 SCt 1889,
20 LEd2d 917 (1968) 21

Terry v Ohio,
392 US 1, 88 SCt 1868,
20 LEd2d 889 (1968) 7, 12, 13, 14

United States v Andrews,
600 F2d 563 (6th Cir 1979) 8

United States v Babwah,
972 F2d 30 (2d Cir 1992) 18, 19

United States v Buchanon,
72 F3d 1217 (6th Cir 1995) 6, 23

United States v Carson,
793 F2d 1141 (10th Cir 1986) 19

United States v Freymuller,
571 FSupp 61 (NDIll 1983) 21

United States v Guzman,
864 F2d 1512 (10th Cir 1988) 10

United States v Jerez,
108 F3d 684 (7th Cir 1997) 12, 18

United States v Jones,
846 F2d 358 (6th Cir 1988) 19, 23

United States v Lee,
73 F3d 1034 (10th Cir 1996) 17, 18

United States v Lucas,
808 FSupp 768 (DColo 1992) 21

United States v Mesa,
62 F3d 159 (6th Cir 1995) 8, 14, 17, 20, 23

United States v Place,
462 US 696, 103 SCt 2637,
77 LEd2d 110 (1983) 13

United States v Rodriguez,
976 F2d 592 (9th Cir 1992) 21

United States v Sandoval,
29 F3d 537 (10th Cir 1994) 11

United States v Saperstein,
723 F2d 1221 (6th Cir 1983) 8

United States v Sharpe,
470 US 675, 105 SCt 1568,
84 LEd2d 605 (1985) 13

United States v Thomas,
863 F2d 622 (9th Cir 1988) 18

United States v Tillman,
963 F2d 137 (6th Cir 1992) 19

United States v Walker,
933 F2d 812 (10th Cir 1991) 10

United States v Waters,
158 F3d 933 (6th Cir 1998) 27

United States v Watts,
7 F3d 122 (8th Cir 1993) 18

Constitutional Provisions, Statutes and Court Rules:

18 USC §3231 2
21 USC §841(a)(1) 2
21 USC §846 2
28 USC §636 . . . . . 1, 24, 25, 26, 28
28 USC §1254 1
ED Mi LR 72.1 . . . . . 1, 24, 26
ED Mi LR 100.1 . . . . . 1, 24
ED Mi LR 200.1 . . . . . 1, 24
F R Crim P 8(a) 25
U S Constitution, Am IV 1

Other Authorities:

LaFave, Search and Seizure (3d ed), §9.2(f) 18

CITATION OF REPORTS OF OPINIONS AND ORDERS ENTERED BELOW

The September 17, 1998, opinions of the United States Court of Appeals for the Sixth Circuit sitting *en banc* are reported at 155 F3d 818 (6th Cir 1998) (*en banc*) [Appendix A]; the order vacating the original panel decision and granting rehearing *en banc* is reported at 78 F3d 232 (6th Cir 1996) [Appendix B]; the opinions of the original panel are reported at 71 F3d 218 (6th Cir 1995) [Appendix C]. The opinions of the district court denying the motion to correct improper assignment of the case and the motion to suppress are not reported [Appendices D and E].

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit sitting *en banc* was entered on September 17, 1998.

This Court has jurisdiction to review this matter pursuant to 28 USC §1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U S Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 USC §636 [Appendix F]; ED Mi LR 72.1 [Appendix G]; ED Mi LR 100.1 [Appendix H]; ED Mi LR 200.1

[Appendix I].

STATEMENT OF THE CASE

Jurisdiction of the District Court. Petitioner James Erwin, Jr., was charged in this case with conspiracy to possess with intent to deliver cocaine, 21 USC §§841(a)(1) and 846, and related offenses. These are "offenses against the laws of the United States". 18 USC §3231.

Case chronology. Following denial of Petitioner's motion to correct improper assignment of the case and motion to suppress, Petitioner entered a conditional plea to one count of the Indictment, specifically reserving his right to appeal the denial of the two motions. On December 8, 1995, the Sixth Circuit reversed Petitioner's conviction, finding the search of his vehicle to have been the product of an unconstitutional detention. 71 F3d 218 (6th Cir 1995), Ryan, J., dissenting. On March 6, 1996, the Sixth Circuit vacated the panel decision and granted rehearing *en banc*. On September 17, 1998, on a 10 to 4 vote, the Sixth Circuit affirmed the denial of the motions. 155 F3d 818 (6th Cir 1998) (*en banc*).

Statement of facts. At about 6:45 p.m., July 31, 1992, Livingston County, Michigan, Sheriff's Deputy Jeffery Wagner responded to a radio run to a truck stop regarding a silver vehicle being driven by a black male possibly intoxicated or reckless (II-3-4).[1] Upon arrival, Wagner saw Petitioner standing outside the car in the parking lot (II-5, 27). Wagner made eye contact with him, and Petitioner, who appeared "a little more" nervous than average, attempted to head back to his car to leave. Wagner told him to stay (II-6, 28, 40). From that point forward, Petitioner

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[1] Page references preceded by Roman numerals I and II are to pages of the October 19, 1993, and November 22, 1993, suppression hearing transcripts, respectively.

was not free to leave (II-30).

Wagner did not smell any alcohol on Petitioner's breath or observe any other signs of possible intoxication, and he did not even bother to conduct any sobriety tests (II-28). There was no other complaint about the car or Petitioner (II-29).

Deputy Michael Hawry, who arrived several minutes later, also testified that Petitioner definitely did not appear to be under the influence of alcohol. He didn't smell any alcohol on him, and Petitioner didn't exhibit any characteristics of being intoxicated. Hawry also did not notice any symptoms of drug intoxication (I-87,107).

On request, Petitioner gave Wagner his driver's license and, after a brief delay, the rental agreement for the car, and he told Wagner he had borrowed the car from someone else (II-8). Wagner claimed to notice that the car's rear seat was ajar, but "[a]t that point I really didn't think much about it". He also noticed a cellular phone on the front seat (II-9).

The basis for the initial stop was by that point resolved, but Wagner did not release Petitioner. He returned to his car and ran a "file check" on him. The check did not indicate any outstanding warrants, but it indicated that Petitioner had a prior record for drugs and weapons and was recently off parole -- "more or less an officer safety type of thing". At that point Hawry arrived and patted Petitioner down, finding no weapons or evidence of criminal behavior (I-80-81, 109; II-10). Petitioner had $846.00 in cash and $135.00 in food stamps in his right front pants pocket. Hawry also claimed to notice that the back seat of the car appeared to be somewhat ajar (I-82).

The officers still did not release Petitioner. Instead, Hawry asked him if he knew how much cash he had and if he had anything in the car he shouldn't have, such as guns or drugs. Petitioner, still somewhat nervous, responded that he did not. Hawry then stated, "Well, then, you don't mind if I look around in the car then, do you, or would you? He again responded no".

Hawry did *not* recall the exact words allegedly used by Petitioner in allegedly giving consent (I-85-86, 88, 131), and Wagner, who overheard this conversation, only guessed at what Petitioner allegedly said: "I *guess* he allowed -- he gave him permission to search the vehicle... if I had to make a *guess*, it was yes, go ahead and search my car" (II-13-14; emphasis added).

Hawry did not advise Petitioner of his Miranda rights before asking if he had any guns or drugs, and he did not tell Petitioner he did not have to consent to a search. Petitioner was neither asked to sign, nor did he sign, a written consent to search form, even though Hawry usually carries one with him.

Wagner conceded that prior to the search, Petitioner had done nothing out of the ordinary other than being nervous (II-16). If Petitioner had not allegedly consented, "more than likely" Hawry would not have searched the car (I-116).

Looking inside the vehicle, Hawry saw a black cloth or leather case. Inside the case were a cellular phone, a small mirror and a blackhead remover he mistakenly believed to be a "coke spoon".[2] There were no drugs or drug residue anywhere on or in the case, the mirror or the blackhead remover, and Hawry found nothing under the passenger seat, nothing under the driver's seat, nothing in the glove box and nothing under either visor (I-83-84, 109-113).

While Hawry looked through the inside of the car, Wagner took Petitioner to the rear of the car. After searching the passenger area, Hawry pulled the rear seat back forward and looked behind it. He claimed that he found a paper bag there with a package of what he believed to be cocaine wrapped in electrical tape inside and then told Wagner to arrest Petitioner (I-

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[2] Neither officer claimed that these items were in plain view: They were "*in* this leather -- this case", and Hawry saw them "*when he looked inside the case*" (emphasis added).

90-92; II-20).

Hawry claimed he then took Petitioner's key ring from him and asked Petitioner for the trunk key. Petitioner told him one of the keys fit the trunk; in fact, none of the keys fit, and the key was in Petitioner's left sock. Hawry claimed he then went back to the car and poked a very small hole in the tarpaper-like material that separated the passenger compartment from the trunk, looking around in the trunk with a flashlight and eventually enlarging the hole to about two inches in circumference, but not seeing anything in there. He then went back to Petitioner and told him he was going into the trunk no matter what. He reached down into Petitioner's socks and found the trunk key in his left sock. He then opened the trunk (I-93-96, 117).

A short while later, Hawry called his desk sergeant, Sgt. Robert Dombrowski. In their conversation, Hawry admitted what had really happened, as related by Dombrowski:

> "Q: It's correct, is it not, he [Hawry] told you *there was a hole between the back of the passenger compartment and the trunk, and that hole was accessible from the passenger compartment and that by reaching through there that's where you would find the cocaine. Is that correct*?"

"A: That was my understanding of the situation, *yes*."(II-96; emphasis added).[3]

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[3] One of several photographs of the vehicle admitted into evidence, Exhibit 506, shows a hole in the trunk with the paper-like material curling *toward* the passenger section of the car, *as if something had been pulled from the trunk toward the interior of the vehicle*.

REASONS FOR GRANTING THE WRIT

I.

WHERE SHERIFF'S DEPUTIES WHO LACKED A REASONABLE BASIS FOR CONTINUING PETITIONER'S WARRANTLESS DETENTION AFTER CLEARING THE INITIAL BASIS FOR THE STOP CONTINUED TO DETAIN HIM, WAS HIS PURPORTED CONSENT TO SEARCH HIS VEHICLE, GIVEN WHILE DETAINED, A DIRECT PRODUCT OF AN UNCONSTITUTIONAL DETENTION, AND SHOULD EVIDENCE SEIZED AS A RESULT OF THAT SEARCH HAVE BEEN SUPPRESSED?

Introduction

The Fourth Amendment guarantees to every individual "'[t]he security of one's privacy against arbitrary intrusion by the police.'" Coolidge v New Hampshire, 403 US 443, 453, 81 SCt 2022, 29 LEd2d 564, 575 (1971) (cite omitted). In our highly mobile society,

> [t]his Amendment protects, in part, the ability of persons to move or travel about the United States without fear of being stopped or detained unless the police have an adequate constitutional justification for doing so ... "freedom of movement is the very essence of our free society, setting us apart."

United States v Buchanon, 72 F3d 1217, 1223 (6th Cir 1995).

An officer's obligation to release an individual immediately upon resolving the initial basis for a stop is an essential element of the well-settled proposition that, to be valid,

a Terry [v Ohio, 392 US 1, 88 SCt 1868, 20 LEd2d 889 (1968),] stop

> *must be temporary and last no longer than is necessary to effectuate the purpose of the stop.*

Florida v Royer, 460 US 491, 500, 103 SCt 1319, 75 Led2d229, 238 (1983) (plurality opinion; emphasis).

Certiorari should be granted because:

> (1) the decision of the Sixth Circuit majority is (a) fundamentally inconsistent with the prior decisions of this Court regarding the permissible scope of a Terry stop, (b) in conflict with the decisions of other circuits which have considered this issue, and (c) incompatible with bedrock Fourth Amendment principles; and
>
> (2) while this Court in Ohio v Robinette, 519 US ___, 117 SCt 417, 136 LEd2d 347 (1996), expressed its unwillingness to establish a bright-line rule that police must advise an individual at the conclusion of a Terry stop of his or her right to leave, this case demonstrates the need for this Court to clarify the nature and extent of an officer's obligation in that circumstance.

A.

At the time of the purported consent, the deputies did not have reasonable cause to continue Petitioner's detention.

There was unquestionably no probable cause for arrest at the time Petitioner was purportedly asked to consent to a search of the car. The deputies had received no report of a crime, they had observed no evidence of a crime, and the original basis for the stop -- the alleged drunk driving -- had quickly been cleared. As such, the continued detention could only have been lawful if supported by reasonable suspicion.

At the time they initially detained Petitioner, the deputies

had, at best, a highly questionable basis for that stop. They had been told of a man possibly driving while intoxicated, but when Wagner came upon Petitioner, he was not driving at all, it was quickly apparent that he was not intoxicated, and Wagner did not even know whether Petitioner had been the driver. Petitioner attempted to leave as Wagner approached, but Wagner would not let him. As such, he was "seized" for constitutional purposes. *Cf.*, *e.g.*, Royer, *supra*, 460 US at 498, 75 LEd2d at 236 (1983) (plurality opinion).

Nor did information gained by the deputies during the initial, lawful stop of Petitioner generate reasonable suspicion that he was a "drug dealer". As Chief Judge Martin stressed for the dissenting judges below:

> Erwin's demeanor and physical condition quickly allayed any concerns the ... officers may have had regarding his inebriation. Once the possibility of inebriation was disproven, ... there was no support for a continuing and more intrusive search... all Deputy Wagner knew was that Erwin appeared "nervous" and that he was wearing some flashy jewelry... Erwin should have been released, not detained while the deputies managed to cobble together enough incriminating evidence to arrest him.

155 F3d at 827, Martin, Ch. J., dissenting.

The deputies, in fact, conceded that, prior to the search, Petitioner had done nothing out of the ordinary other than being nervous and that, if Petitioner had not allegedly consented, "more than likely", the car wouldn't have been searched (I-116; II-16). "[N]ervousness is ... not a ground sufficient in and of itself," United States v Mesa, 62 F3d 159, 162 (6th Cir 1995), however; it is inherently *un*suspicious, United States v Saperstein, 723 F2d 1221, 1228 (6th Cir 1983), and may even be "entitled to *no* weight". United States v Andrews, 600 F2d

563, 566 (6th Cir 1979) (emphasis added).[4]

The district judge found reasonable cause only through unsupportable, unreasonable speculation:

> The officers were entitled to conclude that they may have found a drug distributor, displaying his success and "wealth" in the form of ostentatious jewelry, who had received a page and parked his non-forfeitable rental car near a public pay phone to make a non-interceptable call, rather than broadcasting the details of his drug deal over the airwaves with the cellular phone on his car seat. Convicted of multiple serious offenses and recently released from parole, the very nervous man in the jogging suit was possessed of nearly a $1,000 in cash or readily-convertible food chits, any part of which could have been the proceeds of the day's drug sales.

Appendix D at 55a. The district judge's conclusion's are not only inappropriate, they are utterly incompatible with this Court's decisions in cases such as Reid v Georgia, 448 US 438, 100 SCt 2752, 65 LEd2d 890 (1980). As in Reid, the facts here "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure". Id., 448 US at 441, 65 LEd2d at 894.

There was *no* evidence whatever that Petitioner was involved in drug trafficking. There was *no* evidence of a page, *no* evidence of a telephone call (for a lawful or unlawful purpose) and *no* evidence of any drug sales or possession whatever.

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[4] Moreover, if Petitioner were, in fact, nervous, this would also be a circumstance that would cut *against* the voluntariness of any consent allegedly given.

Petitioner's prior record was *no* evidence whatever of any present wrongdoing. *Cf.*, *infra*. The pager, the cash and the food stamps are common items which were not incriminating individually, taken together or considered along with the other circumstances. Further, they were themselves products of an illegal pat-down, as there was no reasonable basis even for that intrusion into Petitioner's privacy.

In United States v Walker, 933 F2d 812 (10th Cir 1991), as in the case at bar, the defendant was stopped while driving a vehicle that did not belong to him. Also as the deputies claim in the instant case, Walker apparently became very nervous upon being stopped. To the Tenth Circuit, this was not reasonable cause for a further detention. 933 F2d at 816.

Similarly, in United States v Guzman, 864 F2d 1512 (10th Cir 1988), also a cocaine possession case, the Tenth Circuit found no reasonable suspicion to support the continuing detention of a man and a woman initially stopped for a seat belt violation while driving a rented vehicle. After gathering all the information he needed in connection with the traffic violation, that officer, too, began inquiring as to whether the occupants were in possession of any contraband. The officer became suspicious of the woman's nervousness, her refusal to make eye contact with him and her statement that she was in possession of $5,000.00 they had saved for a vacation in Las Vegas. He asked if they were carrying any weapons or contraband, and he claimed that the driver "replied that they were not hiding anything, and the officer was free to look." Id. at 1514.[5] The officer then searched the vehicle and found a package of cocaine behind the rear seat.

Reviewing the district court's grant of the defendants' motion to suppress, the Tenth Circuit upheld the lower court's finding that there was no reasonable cause for a further

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[5] The driver then executed a consent to search form.

detention; the detention became unconstitutional when the officer began inquiring about alleged contraband. Of note, the court found unpersuasive the officer's claims of suspicion based on the passenger's nervousness and possession of $5,000.00. Id. at 1520.[6]

Petitioner's prior record also provided no reasonable ground for suspicion whatever:

> ... even knowledge of a person's prior criminal involvement (to say nothing of a mere arrest) is alone insufficient to give rise to the requisite reasonable suspicion ... and we have found no case elsewhere that even supports the contrary ...
>
> If the law were otherwise, any person with any sort of criminal record...could be subjected to a Terry-type investigative stop at any time without the need for any other justification at all.

United States v Sandoval, 29 F3d 537, 542-543 (10th Cir 1994).

Nor did the one deputy's suspicions that the blackhead remover (mistakenly identified by him as a "coke spoon") or the mirror contribute anything to a reasonable suspicion claim. They are entirely common items, lawfully possessed by thousands of individuals. In the absence of any indication whatever that they were being used for an unlawful purpose, they provided no reasonable basis for suspicion.[7]

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[6] Because the district judge had made no findings of fact on the issue of consent, the case was remanded for the making of such findings. Id.

[7] These items were also not in plain view; Hawry admittedly found them only after going into the leather case and pulling them out. As such, even if there had been anything about them that

See also United States v Jerez, 108 F3d 684, 693-694 (7th Cir 1997).

Petitioner was nervous, and he was sweating, possibly a lot, at about 6:45 p.m. on a day in July. This is entirely unremarkable, and it is simply not enough to constitute reasonable cause for a further detention. He should have been released, and his continued detention was unconstitutional.

B.

Once the initial basis for detention was resolved and in the absence of reasonable suspicion justifying further detention, the deputies were required to release Petitioner without further questioning.

In stark contrast with well-settled law, the Sixth Circuit majority concluded that it was irrelevant whether the initial stop developed a reasonable basis for further detention:

> ... irrespective of whether the deputies were justified in detaining Erwin after he showed no signs of intoxication, and even if they had not, after approaching Erwin, observed conditions raising reasonable and articulable suspicion that criminal activity was "afoot", they were entitled to ask Erwin for permission to search his vehicle.

Id. at 822-823. This statement, if undisturbed, will eliminate the time and scope limitations of Terry in the states comprising the

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contributed to reasonable suspicion of criminal behavior, they could not lawfully be considered as part of the equation. Cf., e.g., Horton v California, 496 US 128, 110 SCt 2301, 110 LEd2d 112 (1990).

Sixth Circuit and

> will provide the opportunity for law enforcement officers to violate Fourth Amendment rights in the future... The next citizen whose Fourth Amendment rights are violated to the extent that Erwin's were impinged is not likely to be carrying a kilogram of cocaine, but he will feel the same lashing injustice of an unconstitutional search.

Id. at 825-826, Martin, Ch. J., dissenting.

Even where a temporary detention is permissible, this Court has long stressed that a Terry stop is severely limited as to time and scope and permissible only to investigate the basis for the initial complaint. The Royer plurality, for example, stressed that

> reasonable suspicion of criminal activity warrants a temporary seizure *for the purpose of questioning limited to the purpose of the stop.*

460 US at 498, 75 LEd2d at 237 (emphasis added). Unless a basis for further detention develops during the initial detention, officers are entitled at most to pursue questions and other investigation limited to the purpose of the initial stop. When the basis for the stop is resolved, and no new basis for detention has arisen, the individual must be allowed to go on his or her way. Id., 460 US at 500, 75 LEd2d at 238 (plurality opinion).

See also Knowles v Iowa, ___ US ___, ___ SCt ___, ___ LEd2d ___ (1998) [1998 WL 840933](reaffirming brevity of permissible traffic stop); United States v Sharpe, 470 US 675, 684, 105 SCt 1568, 84 LEd2d 605, 614 (1985); United States v Place, 462 US 696, 706, 709, 103 SCt 2637, 77 LEd2d 110, 120, 122 (1983) ("the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justified on reasonable suspicion").

This Court insists on these limitations for practical as well as philosophical reasons. Terry represented a significant departure from traditional Fourth Amendment analysis and struck a new balance between governmental and individual rights. Fourth Amendment rights remain of vital importance, and the Court has rejected attempts to expand this area of police authority further.[8] The Court has stressed repeatedly, and practical experience demonstrates, that time and scope limitations on police are necessary to avoid further weakening of these rights.

Given police officers' broad power to make lawful Terry stops, there is an inherent danger of abuse. If police were able to turn a Terry stop into an opportunity for non-consensual interrogation about a subject unrelated to the initial basis for the stop without a reasonable basis for the expanded scope of questioning, the time and scope limitation would effectively cease to exist. As Judge Guy noted for the Sixth Circuit in Mesa, *supra*, 62 F3d at 162:

> at any time of the day or night on any interstate highway within the Sixth Circuit, police officers probably could stop 50 percent or more of the vehicles on the highway for exceeding the speed limit... we have a duty to see that this authority

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[8] *Cf.* Justice Stewart's warning, speaking for the Court in Coolidge v New Hampshire, *supra*, 403 US at 455, 29 LEd2d at 576:

> If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

is not abused...[9]

Meaningful enforcement of these limitations requires that, once the initial basis for a detention has been cleared, officers take *some* action that lets the detained individual know that things have changed and he or she is now free to leave or to choose *voluntarily* to remain. Return of an individual's driver's license and/or informing him or her that they are now free to leave are two reasonable possibilities:

> We also think that the officers' conduct was more intrusive than necessary to effectuate an investigative detention otherwise authorized

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[9] Fourth Amendment rights are also elusive and difficult to enforce. This Court's observation in Elkins v United States, 364 US 206, 217-218, 80 SCt 1437, 4 LEd2d 1669, 1677-1678 (1960), adopting Justice Jackson's dissent from Brinegar v United States, 338 US 160, 181, 69 SCt 1302, 93 LEd 1879, 1893 (1949), speaks directly to this point:

> "But the right to be secure against searches and seizures is one of the most difficult to protect... Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear."

> by the Terry line of cases. First, *by returning his ticket and driver's license, and informing him that he was free to go if he so desired, the officers might have obviated any claim* that the encounter was anything but a consensual matter from start to finish.

Royer, supra, 460 US at 504, 75 LEd2d at 241 (plurality opinion; emphasis added).

In Robinette, *supra*, this Court rejected a bright-line rule that would have required officers specifically to advise individuals that they are free to go before asking questions unrelated to the basis for the stop. What remains unclear and in need of amplification by this Court in this case is what an officer must do when the basis for an initial stop has been cleared and there is no basis for further detention. Even though no specific action or statement is required, the Sixth Circuit majority's implicit conclusion that no action and no statement is necessary flies in the face of this Court's holdings and reasoning. Certiorari should be granted so the Court can clarify that when the initial basis for a stop has been cleared, an officer must in some manner effectively communicate to the detained person that he or she is free to leave. The nature and extent of what is adequate communication will likely vary from case to case and can be assessed in the first instance by trial judges, but this case demonstrates the need for the Court bluntly to express the necessity of meaningful communication in *some* form.

The need for a clear statement from this Court is further reflected in the extent to which the reasoning of the Sixth Circuit majority is at odds with that of other circuits. As noted above, the Sixth Circuit majority found nothing wrong with asking Petitioner for permission to search his vehicle "*irrespective of whether the deputies were justified in detaining ... [him] after he showed no signs of intoxication*" and even in the absence of reasonable suspicion that criminal activity was "'afoot'". 155 F3d at 822-823 (emphasis added). The dissenters, in contrast,

recognized that Petitioner "should have been released, not detained while the deputies managed to cobble together enough incriminating evidence to arrest him". Id. at 827. The majority's reasoning overlooks the distinction -- *critical* in any Terry stop analysis -- between an encounter which begins by consent and one, like the one at bar, based on detention from the outset.

In taking the position it did in this case, the Sixth Circuit majority ignored case law from other circuits and its own prior holdings.[10] The recent Tenth Circuit decision in United States v Lee, 73 F3d 1034 (10th Cir 1996), is illustrative:

> We have repeatedly stated, "'When the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.'" ... Deputy Barney's questions about firearms and drugs were unrelated to his underlying justification for the detention, which was to determine if the Defendant was driving while impaired. After determining that Mr. Lee was capable of driving, Deputy Barney should have terminated the encounter and permitted him and Mr. Lacy to go on their way.

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[10] *Cf., e.g.*, Mesa, *supra*:

> Once the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention.

62 F3d at 162.

Lee, *supra*, 73 F3d at 1039 (cites omitted). See also, *e.g.*, United States v Jerez, *supra*, 108 F3d at 694-695; United States v Watts, 7 F3d 122, 126 (8th Cir 1993); United States v Babwah, 972 F2d 30, 33-34 (2d Cir 1992); United States v Thomas, 863 F2d 622, 628-630 (9th Cir 1988).

See also LaFave, Search and Seizure (3d ed), §9.2(f).

For all of these reasons, the writ should be granted.

II.

WHERE PETITIONER (1) ATTEMPTED TO WALK AWAY UPON BEING APPROACHED BY A DEPUTY SHERIFF, (2) REFUSED TO PROVIDE THE DEPUTY WITH THE VEHICLE'S TRUNK KEY AND (3) HAD HIDDEN THE TRUNK KEY IN HIS SOCK, WHERE THE DEPUTY ASSERTED TO PETITIONER, "THEN YOU DON'T MIND IF I LOOK AROUND IN THE CAR, THEN, DO YOU?", AND WHERE THE DEPUTY HAD TO POKE A HOLE IN THE PARTITION BETWEEN THE BACK SEAT AND THE TRUNK TO PULL SUSPECTED DRUGS OUT OF THE TRUNK THROUGH THAT HOLE, WAS PETITIONER'S PURPORTED CONSENT TO SEARCH THE VEHICLE INVOLUNTARY?

In upholding the district judge's finding of a valid consent to search in this case, the Sixth Circuit majority acknowledged the totality of the circumstances test of Schneckloth v Bustamonte, 412 US 218, 93 SCt 2041, 36 LEd2d 854 (1973), and then failed to apply it. Instead, the majority considered only a portion of the record, a portion contradicted by the physical evidence and the totality of the circumstances. In

doing so, the majority violated the central requirement of Schneckloth.

Given the importance of the values underlying the Fourth Amendment, when police claim an individual has given up a constitutional right by consenting to a warrantless search, the burden of proof is on the government, and the standard of proof is high. Bumper v North Carolina, 391 US 543, 548, 88 SCt 1788, 20 LEd2d 747, 802 (1968); United States v Jones, 846 F2d 358, 360 (6th Cir 1988) ("'consent must be proved by clear and positive testimony, and, to be voluntary it must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion.'").

Moreover, a consent produced as a consequence of an illegal detention is invalid unless sufficiently purged of the underlying taint to be an act of free will. *Cf.*, *e.g.*, Royer, *supra*, 460 US at 507-508, 75 LEd2d at 243 (plurality opinion); Jerez, *supra*, 108 F3d at 694; United States v Babwah, *supra*, 972 F2d at 34; United States v Tillman, 963 F2d 137 (6th Cir 1992); United States v Carson, 793 F2d 1141 (10th Cir 1986). Because Petitioner was being unconstitutionally detained at the time of the purported consent, his alleged consent could not have been an act of free will and was invalid.

Even if Petitioner had not been improperly detained, however, there was still no valid consent to search on these facts. As Chief Judge Martin stressed for the dissenting judges below, the purported consent here was "*nebulous*" and "*far from unequivocal ... particularly when considering that Erwin continued to hide the trunk key in his sock and shoe*", and the deputy's testimony as to the purported consent was "*far from 'clear and positive'*". 155 F3d at 827 (emphasis added).

Petitioner was uncooperative *throughout* his encounter with the deputies. He immediately tried to leave the scene when the first deputy arrived, he would not give the second deputy the key to the trunk, he tried to mislead the second deputy about the location of the key, and the key was, in fact, hidden in his sock.

Petitioner's *attempt to leave* when the first deputy arrived is a clear indication that he had no intention of cooperating; his *refusal* to give the second deputy the trunk key is an unmistakable indication of an unwillingness to accede to the deputies' requests; his attempt to *mislead* the second deputy as to the location of the key further indicates an uncooperative attitude; and *hiding* the key in his sock indicates both a *pre-existing unwillingness to cooperate* with the deputies and an *affirmative intention to prevent* them from obtaining entry to the trunk.

The deputies' claim of consent is further undone by the utter incredibility of their claim as to the facts of how the cocaine came to be found: If the trunk had been empty, Petitioner would not have hidden the trunk key in his sock, there would have been no reason for Petitioner to fear giving the deputies the trunk key, and the second deputy would not have told his desk sergeant that he had retrieved the cocaine by pulling it through the hole from the area behind the back seat.

In Montana v Tomich, 332 F2d 987 (9th Cir 1964), the Ninth Circuit was also faced with a police claim of consent to search in a case in which the defendant had hidden the car's trunk key in his shoe. Like Petitioner, at the time Tomich allegedly consented to the search, he was alone with officers, he was not free to leave, and the trunk key was hidden in his shoe. Affirming the district court, the Ninth Circuit agreed that there had been no valid consent. *Cf.* Application of Tomich, 221 FSupp 500, 503 (DMont 1963) ("If he truly consented to the search, he would have delivered up the key to the officers and saved them all the trouble they went to to get into the trunk of car").

See also Mesa, *supra*, 62 F3d at 161 (officers pried open partition in trunk).

As noted by the Chief Judge Martin below, 155 F3d at 827, it is also significant that neither deputy could recall Petitioner's alleged exact words and that the first deputy twice

characterized his own testimony as to Petitioner's purported consent as a "guess" (II-13-14). These statements are incompatible with a finding of "clear and positive testimony" of an "unequivocal, specific and intelligently given" consent.

For there to be meaningful protection of Fourth Amendment rights, judges must carefully evaluate police claims as suspicious as that advanced here:

> A story which would meet with skepticism if told by a citizen should receive the same reaction when told by a police officer. Testimony which seems to track the holdings of Supreme Court cases need not be rejected on that account, but neither must it be accepted with the breathless innocence of an ingenue.

United States v Freymuller, 571 FSupp 61, 67 (NDIll 1983).[11]

While courts are often left to assess competing claims by police and defendants without other evidence, in which cases the police are almost always found to be credible, in this case there is abundant, clear, physical evidence of the absence of consent -- the hidden trunk key, Exhibit 506 and the second deputy's

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[11] See also Sibron v New York, 392 US 40, 46, 88 SCt 1889, 20 LEd2d 917, 925 (1968) at n3; Elkins v United States, *supra*; Jackson v United States, 353 F2d 862, 865-867 (DC Cir 1965) (discussing and applying doctrine of inherent incredibility in context of police testimony in narcotics case); United States v Rodriguez, 976 F2d 592 (9th Cir 1992) (finding not credible Border Patrol agents' profile testimony in marijuana smuggling case); United States v Lucas, 808 FSupp 768 (DColo 1992) (finding not credible a detective's plain view assertions in cocaine case); People v Kaigler, 368 Mich 281, 299, 118 NW2d 406 (1962) (pointedly referring to the defendant's "*alleged* waiver of constitutional rights"; emphasis added); People v Bordine, 29 Mich App 112, 114, 185 NW2d 164 (1970) at n1.

admission to his desk sergeant of how and where he found the cocaine. A fair evaluation of the totality of these circumstances leads inexorably to the conclusion that there was no consent.

Even if one were to overlook the physical evidence which undoes the deputies' testimony, their claim establishes, at most, mere acquiescence to their requests, also insufficient to support a finding of consent. The purported consent was allegedly given immediately after the second deputy had interrogated Petitioner about a serious criminal offense unrelated to the basis for his stop -- possession of guns or drugs;[12] and the "request" for consent was also presented as a statement, *not* a real option, leaving Petitioner with no effective choice -- "Well, then, you don't mind if I look around in the car then, do you?" (I-86).

This was the kind of "questioning" this Court warned against in Schneckloth, *supra*, where it stressed that "account must be taken of subtly coercive police questions" and "the possibly vulnerable subjective state of the person who consents", 412 US at 229, 36 LEd2d at 864, and in Florida v Bostick, 501 US 429, 435, 111 SCt 2382, 115 LEd2d 389, 398-399 (1991), where it reaffirmed that police may not "convey a message that compliance with their requests is required". See also Bumper v North Carolina, *supra*, 391 US at 548-549, 20 LEd2d at 802 (consent not established "by showing no more than acquiescence to a claim of lawful authority"); Ierez, *supra*, 108 F3d at 692 (officers' "actions, when objectively assessed, 'convey[ed] a message that compliance with their requests [was] required'").

See also People v Kaigler, 368 Mich 282, 118 NW2d 406 (1962), where the Michigan Supreme Court, applying federal law, explained why acquiescence to a police statement is

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[12] Consider also Pennsylvania v Muniz, 496 US 582, 596, 110 SCt 2638, 110 LEd2d 528, 549 (1990), at n10, where the Court acknowledged the pressure to answer questions put by an officer even during a traffic stop.

constitutionally inadequate:

> *"Nonresistance to the orders or suggestions of the police is not infrequent in such a situation: true consent, free of fear or pressure, is not so readily to be found... In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent 'not in accordance with human experience', and explainable only on the basis of 'physical or moral compulsion'..."*

368 Mich at 295 (cites omitted; emphasis added).

It is also significant that the purported consent occurred (1) while the deputies retained possession of Petitioner's driver's license and car rental agreement, (2) in the absence of advice to Petitioner that he had a right to refuse to consent to search, (3) at a time when, if the deputies are to be believed, Petitioner was very nervous, and (4) at a time when Petitioner was refusing to produce the trunk key, continuing a consistent pattern of non-cooperative behavior that included hiding the key and trying to mislead the deputies about its location.

Petitioner also did not sign a written consent to search form, cf. Jones, *supra*, and the deputies made no contemporaneous record of the purported consent. Contrast Muniz, *supra* (encounter videotaped); Buchanon, *supra* (encounter videotaped); Mesa, *supra* (encounter videotaped).

As the Sixth Circuit dissenters would properly hold, the totality of the circumstances in this case preclude a finding that Petitioner specifically, unequivocally or voluntarily consented to a search of the car. Certiorari should be granted to correct this fundamental misapplication of the rule of Schneckloth.

III.

WHERE A CRIMINAL CASE IS PENDING

BEFORE A MAGISTRATE JUDGE AFTER THE FILING OF A COMPLAINT AND PRIOR TO INDICTMENT, DO 28 USC §636 AND ED Mi LR 72.1 AUTHORIZE THE MAGISTRATE JUDGE TO CORRECT THE MISASSIGNMENT OF THE CASE, WITHOUT SPECIFIC REFERENCE FROM A DISTRICT JUDGE, WHERE THE GOVERNMENT DOES NOT OBJECT TO THE MAGISTRATE JUDGE'S CONSIDERATION OF THE MOTION AND THE RIGHT TO THE SUBSTANTIVE RELIEF IS CLEAR?

This case was initiated by the filing of a criminal Complaint in the Eastern District of Michigan's Northern Division at Bay City.[13] The then-applicable local rules required, however, that the case be assigned to the District's Southern Division at Flint. LR 100.1; LR 200.1. Because there had not yet been an indictment, the case was not assigned to a district judge and was pending before a magistrate judge. At the commencement of his detention hearing, Petitioner moved to transfer the case to Flint. The government did not object to the magistrate judge's consideration of the motion, the magistrate judge granted the motion, and the government did not appeal his decision.

While the case was pending in Flint, the government obtained an Indictment and somehow had it assigned to the Northern Division at Bay City, conduct the Sixth Circuit

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[13] Petitioner was initially prosecuted in Livingston County (Michigan) Circuit Court, but the local prosecutor withdrew those charges and referred the matter to federal prosecutors when the judge was about to rule on Petitioner's motion to suppress.

majority agreed was "strongly suggestive of judge shopping".[14] 155 F3d at 825. Petitioner moved before the district judge assigned to the case in Flint to correct the improper assignment of the case, but the motion was heard before the district judge sitting in Bay City.[15] Contrary to this Court's reasoning in Peretz v United States, 501 US 923, 111 SCt 2661, 115 LEd2d 808 (1991), the district judge denied the motion on the ground that the magistrate judge's transfer order was "void".[16] Without consideration of Peretz, the Sixth Circuit affirmed. 155 F3d at 825.

The Sixth Circuit's decision was incompatible with this Court's decision in Peretz, and it sanctioned impermissible judge-shopping in violation of fundamental notions of due process. It, therefore, presents an appropriate opportunity for this Court to (1) clarify the scope of a magistrate judge's authority to rule on non-dispositive motions while a case is pending before him or her and (2) articulate the extent of lower courts' duties to prevent successful judge-shopping.

Consistent with the requirement of 28 USC §636(b)(4) that each district "establish rules pursuant to which the

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[14] It is of no significance that the Indictment includes additional charges not included in the criminal Complaint and alleged to have been committed in the Northern Division. The addition of those charges was anticipated in the Complaint, ¶¶2-5, it is often permissible, *cf.*, *e.g.*, F R Crim P 8(a), and it neither accomplishes a transfer of the case nor creates a right to transfer.

[15] As the Sixth Circuit majority aptly noted, "it is unclear how a Northern Division court ruled on a motion filed in the Southern Division". 155 F3d at 824.

[16] Of note, the district judge permitted Petitioner's then-pending bond motion to remain before the magistrate judge in Flint. Appendix E at 66a.

magistrates shall discharge their duties", at the time involved here the judges of the Eastern District of Michigan had given magistrate judges broad authority, explicitly authorizing them in LR 72.1 to hear and determine non-dispositive motions in criminal cases.[17]

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[17] ED Mi LR 72.1 provided in relevant part:

> (a) Authority of Magistrate Judges
>
> (1) *General.* Pursuant to 28 U.S.C. §636(b)(4), each United States Magistrate Judge appointed by this Court is authorized to exercise all powers and perform all duties conferred upon Magistrate Judges by 28 U.S.C. §636, as amended.
>
> (2) *Specific duties.* Without limitation by exclusion, each United States Magistrate Judge in this District, pursuant to (a)(1) above, may:
>
> ...
>
> (C) hear and determine any non-dispositive pre-trial motions in civil and criminal cases, and hear and recommend the determination of any dispositive motions in such cases; ...
>
> (b) Assignment of Duties to Magistrate Judges
>
> (1) *General.* A Magistrate Judge may perform any of the duties authorized above upon specific reference by a Judge of the Court or pursuant to a general order of the Court assigning duties. In performing such duties the Magistrate Judge shall conform to the general procedural rules of this Court, the instructions of the District Judge to whom the case is assigned, and the Plan for the Administration of the Magistrates System...

In finding the magistrate judge's transfer order to be "void", the Sixth Circuit relied on the absence of an order of reference from a district judge. The specific reference requirement only applies to cases already pending before a district judge, however. No reference can logically be required to bring before a magistrate judge a case that is already pending before him or her; any other reading would at best impede the ability of magistrate judges to conduct routine business necessary to the efficient administration of a district court.

The government's absence of objection to the magistrate judge's consideration of the transfer motion also waived any argument as to the scope of his authority. Just as a magistrate judge may preside over jury selection in a felony prosecution with the consent of the parties, Peretz, *supra*, the government's failure to object to the magistrate judge's authority to consider this motion constituted its consent to his consideration of it. As Justice Stevens explained for this Court in Peretz,

> permitting a magistrate to conduct voir dire in a felony trial when the defendant raises no objection is entirely faithful to the congressional purpose in enacting and amending the Federal Magistrates Act.

501 US at 940, 115 LEd2d at 824. If a party's failure to object is sufficient to permit a magistrate judge to preside over jury selection at a felony trial, it is also sufficient to permit him or her to perform the essentially ministerial task of transferring a wrongly assigned case to the proper division of the court. See also United States v Waters, 158 F3d 933, 936 (6th Cir 1998); Edmondson v International Playtex, Inc, 678 FSupp 1571 (ND Ga 1987). Peretz makes clear that any defect in the entry of an order by a magistrate judge is waivable and is, in fact, waived in

the absence of objection.[18]

Even if the magistrate judge had not had the authority to transfer the case, the government could not have successfully challenged the substantive ruling itself. *Cf.*, *e.g.*, Katz v Molic, 128 FRD 35, 39 (SD NY 1989) (when a magistrate judge decides a motion without proper authorization and the decision is substantively correct, the complaining party must show cause why the decision should not stand). No cause existed in this case for the transfer decision not to stand, and strong cause existed and continues to exist to uphold the transfer decision in order to prevent the government from successfully engaging in impermissible judge-shopping.

The Sixth Circuit's observation in the course of its opinion that there is no constitutional or statutory right to trial in a specific division or courtroom, 155 F3d at 824, is beside the point, and its statement that Petitioner has not shown any prejudice is wrong. Id. at 825. Petitioner had a basic right to be proceeded against in a manner free of improper judge-shopping, the lower courts had a fundamental duty to protect Petitioner from prosecutorial overreaching, and the prejudice is palpable, personal and systemic.

For all of these reasons, the petition should be granted.

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[18] The transfer motion was brought at the commencement of the detention hearing. 28 USC §636(a)(2) authorizes magistrate judges to conduct detention hearings and to "issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial". The magistrate judge's consideration of the motion -- at a time when the case was not assigned to a district judge -- is also properly considered an act ancillary to and within his authority to preside over the detention hearing.

RELIEF REQUESTED

Wherefore, the Petition should be granted, and a writ should issue.

Respectfully submitted,

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Dated: December 16, 1998

APPENDIX A

UNITED STATES of America,)
Plaintiff-Appellee,)
)
v.) **Case No: 94-1766**
)
James ERWIN, Jr.,)
Defendant-Appellant..)
)
_____/

United States Court of Appeals,
Sixth Circuit

Argued June 11, 1997. • Decided Sept. 17, 1998.

Before: MARTIN, Chief Judge; MERRITT, KENNEDY, JONES, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, and COLE, Circuit Judges.

RYAN, J., delivered the opinion of the court in which MERRITT, KENNEDY, NELSON, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, and DAUGHTREY, JJ., joined. MARTIN, C.J. (pp. 825-828), delivered a separate dissenting opinion, in which JONES, MOORE, and COLE, JJ., joined.

OPINION

RYAN, Circuit Judge.

We granted *en banc* review in this case, primarily to decide two questions about the warrantless search of the defendant's motor vehicle

They are:

- Whether, once two law enforcement officers' suspicion that defendant James win, Jr. was driving while intoxicated proved to be unwarranted, they were required to permit him to depart without further questioning, even ff they .then had a reasonable and articulable suspicion of other criminal conduct.
- If the answer is no, whether, in this case, the defendant's .consent to search the vehicle was voluntary.

Our answers to these questions will, of necessity, determine the ultimate issue: whether the search of Erwin's vehicle was reasonable under the Fourth Amendment.

There is a second issue in this case, although it is not one for which we granted *en* banc consideration: whether the district court erred, to the defendant's unfair prejudice, in refusing to direct that the case be heard in the Southern Division, rather than the Northern Division, of the United States District Court for the Eastern District of Michigan.'

I.

When we granted the government's petition for *en banc* review, we vacated the judgment of the panel of this court that held, in divided opinion, that the district court erred in denying the defendant's motion to suppress the fruits of the search of his vehicle. because, "[a]fter the traffic matter was concluded in the instant case, the defendant: appellant should have been released." Unit*ed States v. Erwin,* 71 F.3d 218, 222 (6th Cir.1995), *vacated,* 78 F.3d 232 (6th Cir. 1996):

We now hold that the warrantless search of the defendant's vehicle was not unconstitutional under the Fourth Amendment because (1) the Constitution does not mandate that a driver, after being lawfully detained, must released and sent on his way without further' questioning once the law enforcement determines that the driver has not, in fact, engaged in the: particular criminal conduct for which he was temporarily detained; and (2) the district court's determination that the defendant's consent to search his vehicle was voluntary is not clearly erroneous. We also hold that the district court did not err in refusing to order the intra district assignment requested by the defendant.

II.

In conducting the warrantless search that is the primary focus of this opinion, the arresting deputy sheriffs discovered one kilogram of cocaine in the defendant's car. Subsequently, the defendant entered a conditional guilty plea to an indictment charging him with possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). The plea was conditional because Erwin wished to preserve for review the district court's denial of his earlier motions to suppress the cocaine and to "correct an improper assignment" Of his case to the Northern Division of the United States. District Court for the Eastern District of Michigan.

III.

A.

Accepting, as we must unless clearly erroneous, the factual determinations made by the district court concerning the circumstances of the warrantless search and seizure, it appears that the following series of events occurred on. July 31, 1992. At approximately 6:45 p.m., Livingston County

Deputy Sheriffs Michael Lawry and Jeffrey Wagner; in separate patrol cars, received a general police broadcast regarding a drunk or reckless driver. The broadcaster provided a description of the vehicle, the license plate number, and a description of the driver. Deputy Wagner spotted a vehicle matching the description at the Oasis Truck Stop at the intersection of M-59 and U.S. 23 in Livingston County, Michigan.

The defendant who matched the description of the driver, was standing between the vehicle and a set of phone booths. Deputy Wagner drove up to Erwin According to Wagner, Erwin Appeared nervous. As Wagner got out of his vehicle to approach Erwin, it appeared to the deputy that Erwin was attempting to get back into his car and "flee" the scene. Deputy Wagner advised Erwin to "stay there" and told him why he was stopped. As Wagner approached Erwin, Wagner noticed a cellular phone on the front seat of Erwin's vehicle and .noticed that one of the cushions in the backseat was loose. According to Wagner, Erwin did not say very much, but appeared nervous; he took his hat off several times, rubbed his hand though his hair, and rubbed his hands together. Erwin was wearing a jogging suit, gym shoes, and a lot of jewelry.

Erwin complied with Wagner's request for Erwin's driver's license, but explained' when asked for the car's registration and proof of insurance that the car was borrowed from a friend who had rented it. Wagner returned to his patrol .car to run a standardprocedure LEIN check on Erwin..The dispatcher advised Wagner that Erwin had several prior convictions for drug and weapons offenses, and that Erwin had recently finished a term of parole. As the dispatcher was relaying this information, Deputy Lawry, who also heard the radio broadcast, arrived at the scene. Lawry asked Wagner if

he had patted Erwin down. When Wagner answered that he had not, Lawry approached Erwin in order to do so.

Lawry testified that Erwin was extremely nervous. He noted that Erwin. was sweating profusely, that his eyes Were darting around,' that he kept taking off his hat and running his hand through his hair, and that he kept reaching into his pocket. As Lawry approached the vehicle, he noted that the back cushion to the rear seat. was ajar and positioned higher than normally it 'would be. Upon patting down Erwin, Lawry felt a. square object in Erwin's pocket. Lawry retrieved from the pocket a pager, $846 in loose 'cash, and $I35- worth of' food stamps. Either immediately before, during, Or immediately after the pay down, Lawry saw a black cloth case on the front passenger seat of Erwin's vehicle. Lawry testified that the case was open and that it contained a cellular phone, a small mirror, and what Lawry erroneously believed to be a cocaine spoon. In fact, the"spoon" turned out to be a blackhead remover used to treat acne.

Although the deputies were satisfied that Erwin was not under the influence of alcohol or drugs, they suspected by. then that Erwin might be a drug distributor. The district court later summarized the bases for the deputies' suspicion, as established through their testimony at the Suppression hearing:

> The officers were entitled to conclude that' they may have found a drug distributor,. displaying his success and "wealth" in the form of ostentatious jewelry, who had received a page and parked Ms nonforfeitable rental car near a public phone to make a *non-interceptable* call, rather than broadcasting the details of his .drug deal over the airwaves with the cellular phone . on his car seat. Convicted of multiple serious offenses and recently released from parole, the very

> nervous man in the jogging suit was possessed of nearly a[sic] $1,000 in cash or readily-convertible food chits, any part of which could have been'. .the proceeds of the *days* drug sales.

Lawry then asked Erwin how much cash he had. Erwin responded that he did not know. Lawry, referring to the articles '" taken from' Erwin's pockets and the objects, observed On the front seat of the car, asked him to whom the narcotics-paraphernalia belonged; Erwin answered that he did not know. Next, Lawry asked him whether he had anything in his car that he should not have such as weapons or drugs. Erwin answered that he did Lawry then said, "Well, then, you don't mind if I, look around in the car then, do you, or would you?" Erwin said, "[N]o". Lawry deemed this response to be consent to search the car. Lawry did not inform Erwin that he was not obligated to consent to a search, nor did he give him a consent form to sign. Lawry later explained that he did not have a form with him Lawry testified that, at the time he asked for permission to search, he did not have his gun drawn, he used a normal tone of voice with the defendant, and the • defendant was still nervous but coherent and did not appear to be under the influence of alcohol or drugs.

A search, of the vehicle uncovered, one kilogram of powder cocaine packaged in a brick shape and wrapped with electrical tape'. The package was retrieved from be 'hind the loosened backseat cushion. After finding the package, Lawry instructed Wagner to place the defendant under arrest..Wagner arrested, cuffed, and placed Erwin in the patrol car.

After being indicted for possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), Erwin filed a motion to suppress the evidence recovered at the Oasis Truck Stop. Relevant to this appeal, the district court

heard testimony from Deputies Wagner and Lawry, credited their testimony that the defendant had given his consent voluntarily, found that Erwin "took a chance, gave a knowing consent, but lost the gamble, and denied the defendant's motion to suppress the kilogram of cocaine. Apparently, the defendant did not offer any testimony in his own behalf.

B.

[1, 2] When reviewing the denial of a motion to suppress evidence, the appellate court must consider the evidence in the light most favorable to the government. *United States v. Shamaeizadeh,* 80 F.3d 1131, 1135 (6th Cir.1996). Whether consent to a search is voluntarily given is a question of fact. *United States v. Crowder,* 62 F.3d 782, 787 (6th Cir.1995), *cert. denied,* 516 U.S. 1057, 116 S.Ct. 731, 133 L.Ed.2d 682 (1996). Thus, a district court's finding of voluntary consent will be reversed only if clearly erroneous. *United States v. Calhoun,* 49 F.3d 231, 234 (6th Cir. 1995).

[3,4] A law enforcement officer may make a brief investigatory stop of an individual so long as there is a reasonable basis for doing so. *Terry v. Ohio,* 392 U.S. 1, 22-24
88 S.Ct. 1868, 20 L.Ed.2d 889(1968). Specifically, "the police can stop and briefly detain a person for investigative purpose if the officer has a reasonable suspicion supported by ariculable, facts that criminal activity may be afoot', even if the officer lacks probable cause.' *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d (1989). A law enforcement officer is generally justified in stopping an individual and asking for identification when relying on information transmitted by a valid police bulletin *See United States v. Hensley* 469 U.S. 221, 232, 105 S.Ct. 675, 83

L.Ed.2d 604 (1985). Obviously, stopping Erwin was proper in light of the fact that both he and his vehicle matched the description given by the general police broadcast of a possible drunk or less driver.

1.

[5, 6] After the deputies satisfied themselves that Erwin was not drunk or otherwise impaired, they were justified in continuing to detain Erwin if, by then, they reasonable and articulable suspicion that Erwin was engaged in other criminal activity. We think, as the district court did, that the deputies were reasonably entitled to conclude that Erwin may have been a drug dealer based on the facts that he (1) was nervous, (2) seemed to try to avoid being questioned by attempting to leave, (3) seemed to have used or was preparing to use a pay to make a call when a cellular telephone available, (4) seemed to have drug paraphernalia in his vehicle, (5) had a large amount of cash, (6) had no registration or proof of insurance, (7) had a criminal record of violations, and (8) had an out-of-place back seat cushion. Although many of these facts are consistent with innocence, all that is required is that the deputies suspicion be "reasonable" and "articulable" as determined. the totality of the circumstances. *See Sokoow*, 490 U.S. at 6-8, 109 S.Ct ~ 1581. We find this standard was met.

[7,10] Moreover, irrespective of whether the deputies were justified in detaining Erwin after he showed no signs of intoxication.

and. even if they had not, after approaching Erwin, observed conditions raising reasonable and articulable suspicion that criminal activity was "afoot," that were entitled to ask Erwin for permission to searches his vehicle. A law enforcement officer does not violate the Fourth Amendment merely by

approaching an individual, even when there is no reasonable suspicion that a crime has been committed, and asking him whether he is willing to answer some questions. *Florida v. Royer,* 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). This includes a request for consent to search the individual's vehicle. *United States v. Dunson,* 940 F.2d 989, 994 (6th Cir. 1991). And, this consent is not vitiated merely because the valid suspicion of wrongdoing for which an individual has been stopped proves to be unfounded or does not result in prosection and the individual has been stopped proves to be unfounded or does not result in prosecution and the individual is free to go before being asked. *See Ohio v. Robinett,* 519 U.S. 33, 117 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996). Of course, when a law enforcement officer no longer has any reasonable suspicion of criminal activity, the detained Individual is conditionally free to leave; and if the officer rejects the individual's indication that. he would like to leave, valid consent can no longer be obtained. The fruits of a search conducted under these circumstances would have to be suppressed. Here, the deputes, in continuing to detain Erwin for further at-the-scene questioning, given what they observed, proceeded eminently reasonably. To have. simply sent Erwin on his way, without brief further questioning at the very least, would have been plainly unreasonable, even inept, police work. Therefore, we hold that the deputies did not violate. Erwin's constitutional rights when, after determining that he was not, or more precisely, had not been, a drunk, or impaired driver, they continued to detain him briefly to request his consent to search his vehicle.

2.

The second of the two questions that must be answered in whether Erwin's subsequent consent to search the

vehicle was voluntary.

[11-13] "[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The burden of proving that consent was voluntary is on the government. *Id.* at 222, 93 S.Ct.2041. "[C]onsent must be proved by clear and positive testimony, and to be voluntary it must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion." *United States v. Scott,* 578 F.2d 1186, 1188-89 (6th Cir. 1978). The defendant's knowledge of his right to refuse to consent is a factor but the government need not prove that consent was voluntary. *Schneckloth,* 412 U.S. at 226-27, 93 S.Ct. 2041.

The district court concluded that the " 'knowing and intelligent consent' argued by the government has been proven..by.'a preponderance, with evidence that is clear .and convincing .... The defendant was not threatened and nothing about the atmosphere was coercive from the perspective of a rational person."This conclusion is not clearly erroneous.

[14] Lawry asked Erwin whether he had anything in his car that he shoed not have such as weapons or drugs. Erwin answered that he did not. Lawry then said, ''°Well, then, you don't mind ff I look around in the car then, do you or would you?". Erwin, said "[N]o." Erwin object to the form of the "question," arguing that. it was really a Statement. We disagree. Although it was not a neutral question, it plainly sought Erwin's permission to search the vehicle; '.the defendant still could, have refused to, consent to the search. Erwin does not allege that he did not have knowledge of his fight to refuse to consent. Additionally, the deputies did not remove

the defendant from the parking lot of the truck stop; they did not make any show of force,, such as drawing, their weapons or touching the' defendant; and both deputies testified that they did not employ stern or threatening language. Thus, the district court did not clearly err in concluding that the defendant's consent was voluntary. Consequently, Erwin's motion to suppress was properly denied.

A.

On June 16, 1993, Erwin was charged in a one-count criminal complaint in the Northern Division of the Eastern District of Michigan at Bay City with possession of cocaine with intent to distribute, in violation of 21 U.S.C. § .841(a)(1). During the defendant's appearance before a magistrate judge on June 23, Erwin requested that the case be transferred from the Northern Division in Bay City to the Southern Division in Flint, which is closer to the Livingston County location where Erwin was arrested: On June 24, the magistrate judge granted the request under Local Rules 200.1 and 100.1(c) and (d), since amended, of the Eastern District of Michigan.

Six days later, on June 30, a grand jury in the Northern Division at Bay City indicted the defendant on six drug-related counts. Counts One through Five alleged various drug activities occurring in the Northern Division. The counts were founded on warrant-based searches of two houses in Saginaw, Michigan, which is located in the Northern Division. Count Six charged Er. win with intent to distribute the drugs found in his vehicle at the Oasis Truck Stop in Livingston County, part of the Southern Division. Based on the government's request, the one-count complaint, which had been filed in the Northern Division on June 16 and transferred to the Southern Division, was dismissed on July 20, 1993. The six-count indictment was assigned to the Northern

Division, and Erwin was arraigned in the Northern Division in Bay City, also on July 20. At the arraignment, Erwin objected to the proceedings taking place in the Northern Division.

On July 29, 1993, Erwin filed a motion in the Southern Division to correct the allegedly improper assignment of the indictment to the Northern Division. Although it is unclear how a Northern Division court ruled on a motion filed in the Southern Division, the district court for the Northern Division denied the motion, ruling that the June 24 order transferring the ease to Flint was void because the magistrate judge acted beyond the scope of his authority when he made suet a ruling without a reference from a district court judge. According to the district court, because the indictment alleged crimes occurring in the Northern Division and because the case could not be considered as already proceeding in the Southern Division, the case was properly assigned to the court at BayCity.

[15] Although the Sixth Amendment Fed. R.Crim. P. 18 require that a defendant's trial take place in the *district* where crime was committed, there is no constitutional or statutory requirements that a defendant's trial take place in a specific courtroom or *division* within a federal judicial district. *See* U.S. CONST. amend. IV; Fed.R.Crim.P,18; *United States v. Reynolds, 64.* F.3d (7th cir.1995), denied, 1138, 116 S.Ct. 969, 133 L.Ed.2d 890 (1996.) Prior to 1966, Fed. R.Crim. P. 18 provided a statutory right to trial in the division where the defendant's offense allegedly occurred'. In 1966, however, that right was eliminated Rule 18 now reads:

> Except as otherwise permitted by statute or by these rules, the prosecution sba5 be had in a *district in* which the offense was committed. The court shall fix

> place of trial within the district with due regard to' the convenience of the defendant and the witnesses and the prompt administration of justice.

(Emphasis added.)

[16] In 1993, Rule 100.1(c) of the Local Rules for the Eastern District of Michigan directed the clerk of the court' to assign certain cases to specific divisions depending on where the offense occurred. Rule 100.1(a) provided that crimes alleged to have been committed in Livingston County be assigned to Flint, in the Southern division, and those alleged to have occurred in Saginaw be assigned to Bay City, in the Northern Division. There was no rule providing for the assignment of cases in which crimes were alleged to have been committed by a single defendant in both the Southern and Northern Divisions. Thus, it appears, ignoring for the moment the June 16th complaint, that the six-count indictment could have been assigned to either the Northern or the Southern Division under the local rules. Therefore, in the absence of any evidence that Erwin was prejudiced by the assignment to the Northern Division, the only ruling that may be challenged by the defendant is the district court's voidance of the magistrate judge's transfer to Flint of the June 16 complaint.

Local Rule 72.1(b)(1) of the Eastern District of Michigan provides that magistrate judges "may perform any the duties authorized [by Local Rule 72.1(a)] upon specific reference by a [district court judge]." Rule 72.1(a), subsection (2)(C) allows a magistrate judge

> to hear and determine any non-dispositive pretrial motions in civil and criminal cases, and hear and recommend the determination of any dispositive motions in such cases.

Local Rule 100.1(d) governed improper assignments. That rule provided:

> A case improperly assigned to a place of holding court shall be transferred to the proper location by order of the Court.

Thus, although a magistrate judge who been *specifically referenced* by a district judge to hear and determine Erwin's June 23, 1993, transfer motion would have had to transfer Erwin's case to Flint, the district court for the Northern Division correctly held the transfer void. Having been done *without* a specific reference as required by Rule 72.1(b)(1), the magistrate judge's transfer order was beyond the scope of his authority.

Although the prosecution's conduct is strongly suggestive of judge shopping, we have previously held, in a ease alleging that the government purposely tried to assign a case to a particular judge:

> Even when there is an error in the process by which the trial judge is selected, or when the selection process is not operated in compliance with local rules, the operated in compliance with local rules, the defendant is not denied due process as a result of the error unless he can point to come resulting prejudice.

Sinito v. United States, 750 F.2d 512, 515 (6th Cir. 1984). In laying down this rule, we reasoned:

> Local rules governing the assignment of cases are designed as internal housekeeping rules to promote the efficient operation of the district courts; they are not meant to confer rights on litigants.

Id. Erwin has alleged no prejudice, and the record does not evidence any.

Absent the void transfer, the original one-count complaint was still pending in the Northern Division on June 30 when the grand jury in the Northern Division returned the

six-count indictment alleging crimes in the Northern Division. Thus, the district court did not err in ruling that the Northern Division at Bay City was a proper venue.

V.

For the foregoing reasons, the judgment of conviction is **AFFIRMED.**

BOYCE F. MARTIN, JR., Chief Judge, with whom Judges JONES, MOORE', and COLE join, dissenting.

We have here the simple question of whether there are limits on .detentions and searches based on reasonable suspicion. Can law enforcement officers extend a detention and increase the extent of their search until they found conclusive evidence of wrongdoing and elicit a consent from a detainee? The en banc majority opinion permits such activity by law enforcement officers. I believe the limits must be more sharply drawn. When discussing searches based on reasonable suspicion, we are dealing with lesser level of Fourth Amendment protection than that provided by the probable cause standard. Previous cases have emphasized the importance of limiting searches based on mere reasonable suspicion, whereas the en banc majority has expanded the ambit of searches based on reasonable suspicion. I respectfully dissent because I do not wish to erode the Fourth Amendment's protections further.

Defendant James Erwin, Jr., is not a sympathetic character. He has a lengthy criminal record that includes several drug offenses. The police found a kilogram of cocaine in his car. Nonetheless, his Fourth Amendment rights were violated, and the standard the en banc majority sets here will provide the opportunity for law enforcement officers to

violate Fourth Amendment rights in the future. This dissent is not about setting drug dealers free; it is about using the proper methods under the Fourth Amendment in apprehending them. The next citizen whose Fourth Amendment rights are violated to the extent that Erwin's rights were impinged is not likely to be carrying a kilogram of cocaine, but he will feel the same lashing injustice of an unconstitutional search.

The touchstone for judging searches and seizures of this nature is reasonableness, and the Supreme Court sets out the test in Terry *v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed£d 889 (1968): "[I]n determining whether the seizure and search were unreasonable' our inquiry is a dual one-whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." I& at 19-20, 88 S.Ct. 1868. The stop in this case is analogous to a *Terry* stop. *Berkemer v. McCarty,* 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). I take issue not with whether the stop was initially justified, but rather with the officers' extension of the search beyond its allowable scope.

I.

I will not go into an extensive rendition of the facts because the en banc majority already has done so, but I will highlight those facts germane to the scope of the search. On July 31, 1992, Livingston County Deputy Sheriff Jeff Wagner heard a police radio call for a possibly drunk and reckless driver. There was no indication in the radio call of suspicion of drug trafficking or possession of narcotics. Erwin and his vehicle matched the broadcast description, and Wagner approached Erwin at a truck stop in response to .the call. Wagner testified that Erwin merely looked "nervous." In his contemporaneous report, Wagner had described Erwin as just

"somewhat nervous." Wagner did not say at what point he determined that Erwin was not intoxicated, but Wagner gave no indication that he ever thought Erwin was intoxicated. Wagner testified in the suppression hearing that "I didn't smell an odor at that particular time," and that he did not observe that Erwin had glazed eyes, slurred. speech, dilated pupils, or any other indicia of intoxication.

Livingston County Sheriff Deputy Michael Lawry arrived on the scene while deputy Wagner was running a warrant and license check. Deputy Lawry gave no indication that he ever thought Erwin was drunk. "Alcohol definitely not," Deputy Lawry testified at the suppression hearing. I didn't smell any alcohol on him, he didn't exhibit any characteristics.' Deputy Lawry also quickly realized Erwin was not intoxicated with controlled substances: "[H]e .was very cognizant of what was going on and aware of what was happening. Deputy Lawry admitted that he realized Erwin was not intoxicated with controlled substances "upon approach and observation of him, yes. Neither officer performed a roadside intoxication test. Deputy Lawry nonetheless 'continued to detain Erwin and eventually gained Erwin's consent for a car search.

II.

The nearly instantaneous realization that Erwin was. not intoxicated should have ended the encounter, but it did not. Ultimately, the chain of evidence progressed from observance of Erwin's nervous demeanor to the sighting of a cellular phone, mirror, and blackhead remover in the car to the discovery of a pager and nearly a thousand dollars worth of cash and food stamps in Erwin's pocket to the discovery of cocaine somewhere in the rear of the car. The chain should have been nipped long before the discovery of the cocaine.

The brevity and limited nature of *Terry*-type stops have been affirmed repeatedly *See, e.g., United States v. Obasa,* 15 F.3d 603, 607 (6th Cir. 1994). In Terry the Supreme Court simultaneously created the possibility for limited searches based on reasonable suspicion and limited the application and scope of such searches. "The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry,* 392 U.S. at 19, 88 S.Ct., 1868 (internal quotation marks omitted) "[U]nless the detainee's answers provide the officer with probable cause to arrest, him, he must then be released." *Berkemer,* 468 U.S. at 439-40, 104 S.Ct. 3138. 'Erwin, however, was detained until the officers did have probable cause to arrest him.

Erwin's demeanor and physical condition quickly allayed any concerns the law enforcement officers may have had regarding his inebriation. Once the possibility of inebriation was disproven, as it quickly was, there was no support for a continuing and more intrusive search. Given that Deputy Wagner never performed a roadside sobriety test and never seemed seriously to question Erwin's sobriety, the point at which his suspicions were put to rest would appear to have been very early in the chain of events before Deputy Lawry even arrived. At that point, all Deputy Wagner knew was that Erwin appeared "nervous" and that he was wearing some flashy jewelry. "[N]ervousness is generally included as one of several grounds for finding reasonable suspicion and not a ground sufficient in and of itself." *United States v. Mesa,* 62 F.3d 159, 162 (6th Cir. 1995). Erwin should have been released, not detained while the deputies managed to cobble together enough incriminating evidence to arrest him.

Everything Deputy Lawry discovered should be factored out of the equation. Erwin had disproven the original

justification for the *Terry* stop, and Deputy Wagner should have released him. "When police actions go beyond checking out the suspicious circumstances that led to the original stop, the detention becomes an arrest that must be supported by probable cause." *Obasa,* 15 F.3d at 607. The officers did not have reasonable suspicion to continue their search, let alone probable cause.

III.

I disagree with the en bane majority's answer to the "second question" whether consent to search was voluntary for two reasons. First, I believe there are significant questions whether Erwin's consent was free and voluntary and unequivocal. In addition, I believe that the combination of the unlawful detention and the nebulous nature of the consent made Erwin's consent invalid.

The facts of the case seem to indicate that the district court clearly erred in determining that the consent was voluntary. Consent is judged under the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). "Consent must be proved by clear and positive testimony and must be unequivocal, specific, and intelligently given, uncontaminated by any duress and coercion." *United States v. Williams,* 754 F.2d 672, 674-75 (6th Cir.1985). Deputy Lawry characterized the consent exchange in this way: "I said: Well, then, you don't mind if I look around in the car then, do you, or would you? He again responded no." This is far from an unequivocal consent, particularly when considering that Erwin continued to hide the trunk key in his sock and shoe. Deputy Lawry's testimony regarding the consent was also far from "clear and positive." Deputy Lawry conceded that he could not remember the exact words he used to obtain Erwin's consent,

and Lawry obtained no written consent from Erwin. Deputy Wagner testified that "I can't say, word for word" what Deputy Lawry said in requesting consent. A questionable consent hazily recollected fails to meet constitutional requirements.

Regardless of whether the consent was voluntary, it never would have occurred had the deputies released Erwin when they realized he was not intoxicated. I am not advocating a brightline rule that any consent given during an illegal detention is invalid. This Court already has rejected such a rule. *See United States v. Guimond,* 116.F.3d 166, 170-71 (6th Cir. 1997). I do believe, however, that this Court must cast a strict eye toward consent given during an illegal detention. I would recommend following the approach advocated by the Tenth Circuit. In *United States v. Walker,* 933 F.2d 812 (10th Cir. 1991), that court put forward the following standard: "If the consent is not sufficiently an act of free will to purge the primary taint of the illegal detention, however, it must be suppressed as 'fruit of the poisonous tree.'" *Id* at 817 (quoting *United. States v. Maez,* 872 F.2d 1444, 1453 (10th Cir.1989)). Given its questionable nature, Erwin's consent was not sufficient to purge the taint of the illegal detention. The *cocaine* discovered in the search of Erwin's car should have been suppressed as the fruit of the poisonous tree.

The en banc majority's position would allow law enforcement officers to bootstrap full-scale searches onto *Terry* searches. Even if the detainee clearly has not done the act for which he was stopped, the police will find something nervousness, perhaps; or flashy clothing, 'possibly; or a general shiftness to justify continuing the detention. The en banc majority validates this sort of police action in this case and for future cases. Whether the police eventually do find something incriminating in their extended Terry searches, the

civil rights of the guilty and innocent will suffer in the process.

At the point where the call leading to the initial Terry search has been cleared, the officer must have probable cause to continue. Deputies Wagner and Lawry did not in this case. Furthermore,. if the officers do illegally extend a Terry stop and subsequently elicit consent to search during their unlawful detention, they should have to meet a higher standard to show that consent was voluntary. They have not done so in this case. "IAI search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry*, 392 U.S. at 18, 88 S.Ct. 1868. This was just such a search, and I respectfully dissent from the en bane majority's decision to allow the fruits of this search into evidence.

APPENDIX B

UNITED STATES of America Plaintiff-Appellee,	)	
James ERWIN, Jr., Defendant-Appellant.	)	**Case No: 94-1766**

United States Court of Appeals,
Sixth Circuit.

March 6, 1996.

Before: MERRITT, Chief Judge; KENNEDY, MARTIN, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, and COLE, Circuit Judges.

was the intent of the district court. Even if this was the court's intent, however it does not is moot change the fact that this case, as presented to us, is moot.

ORDER

Prior report: 71 F.3d 218.

A majority of the Judges of this Court in regular active service have voted for rehearlng of this case en banc. Sixth Circuit Rule 14 provides as follows:

The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly, it is **ORDERED** that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as possible.

APPENDIX C

UNITED STATES of America, Plaintiff-Appellee,

v.

James ERWIN, Jr., Defendant-Appellant.

No. 94-1766

United States Court of Appeals,
Sixth Circuit.

Argued May 16, 1995.

Decided Dec. 8, 1995.

MATIA, District Judge, delivered the opinion of the court, in which JONES, J., joined. RYAN, J. (pp. 223-26), delivered a separate dissenting opinion.

MATIA, District, Judge.

Defendant-appellant, James Erwin, Jr., appeals his conviction entered after he pleaded guilty to possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). We are asked to determine whether the district court erred in (1) denying defendant-appellant's motion to correct improper assignment of the case, and (2) denying defendant – appellant's motion to suppress. For the reasons that follow, the conviction is reversed and remanded.

I.

At about 6:45 p.m. on July 31, 1992, Livingston County Sheriff's Deputy Jeffrey Wagner was on patrol when he received a police radio broadcast concerning a silver vehicle, including a license plate number, being operated by a possibly intoxicated black male. In response to the radio broadcast, Deputy Wagner drove to the Oasis Truck Stop, a large gas station and restaurant facility at the intersection of M-59 and U.S. 23 in Livingston County, Michigan.

When Deputy Wagner arrived at the truck stop, he saw defendant James Erwin, Jr. standing outside a car matching the broadcast description. Upon making eye contact with Erwin, Deputy Wagner noted that he appeared "a little more nervous" than average. As Erwin attempted to return to his car, Deputy Wagner advised him to "stay there" and explained the nature of the contact. Although Deputy Wagner testified that he neither smelled alcohol on Erwin's breath nor perceived any other signs of intoxication, he proceeded to ask Erwin for his license, car registration and proof of insurance. Er-win produced his driver's license and a car rental agreement, stating that he had borrowed the rental car from a friend. Upon running a routine license check, Deputy Wagner learned that Erwin had a prior record for drugs and weapons and was recently off parole.

It was at this point that Livingston County Sheriff's Deputy Michael Lawry,[1] who was privy to the same radio

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[1] The Record of District Court Proceedings ("Record") refers to Michael Hawry as well as Michael Lawry. For purposes of the opinion, he will be referred to as Michael Lawry.

communication, arrived at the scene and asked Deputy Wagner whether he had a chance to "pat down" Erwin, to which Wagner responded that he had not. Upon performing the pat down search, Deputy Lawry discovered a pager, $846.00 in cash and $135.00 in food stamps. While he was conducting the search, Deputy *Lawry* noticed a cellular phone and what appeared to Lawry to be drug paraphernalia on the front seat of Erwin's ear. In response to the question of whether Erwin had anything in the ear which he shouldn't, such as drugs or guns, Erwin responded that he did not. Deputy Lawry then stated, "Well, then, you don't mind if I look around in the ear then, do you?", to which Erwin replied, *"No."* Lawry proceeded to search the ear. A search of the ear revealed a one-kilogram package of cocaine.

Approximately seven weeks prior to this incident, on June 7, 1992, a warrant-based search of a house located in Saginaw, Michigan, turned up various drugs, a firearm and papers bearing Erwin's name. The search also produced papers and mail indicating that Erwin was connected to a second residence located in Saginaw. Consequently, a warrant-based search was conducted later that same day at the second residence. This search yielded drug paraphernalia with heroin residue, $4,500.00 in cash, a pager, a police scanner and documents linking Erwin to both residences.

On June 16, 1993, in the Northern Division of the United States District Court for the Eastern District of Michigan ("Northern Division'') at Bay City, Erwin was charged in a one-count criminal complaint with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841. Although the complaint outlined the searches and seizures that occurred in Saginaw, the sole charge referred exclusively to the July 31, 1992, arrest of Erwin at the Oasis Truck Stop in *Living*ston County.

At his detention hearing, Erwin requested that the case be transferred to the Southern Division of the United States District Court for the Eastern District of Michigan ("Southern Division") at Flint, pursuant to Local Rules 200.1 and 100.1(c) and (d) of the Eastern District of Michigan. Over the government's objection, the magistrate judge granted Erwin's motion.

On June 30, 1993, a grand jury in the Northern Division returned a six-count indictment against Erwin, charging conspiracy to distribute cocaine within the Northern Division of the Eastern District of Michigan, various other drug and weapons charges stemming from the warrant-based searches that took place in Saginaw on June 7, 1992, and a single charge mirroring the June 16th complaint flowing directly from the events that transpired on July 31, 1992, at the Oasis Truck Stop in Livingston County.

The six-count indictment was assigned to the Northern Division docket; accordingly, Erwin was arraigned in the Northern Division on July 20, 1993. On July 29, 1993, Erwin filed, in the Southern Division case, a motion to correct improper assignment of the Northern Division indictment. On August 24, 1993, the district judge denied Erwin's motion, declaring void the magistrate judge's June 16th order transferring the original case to the Southern Division.

On October 18, 1993, Erwin filed a motion seeking to suppress the fruits of the two warrant-based searches in Saginaw as well as the cocaine seized in the warrantless search in Livingston County. After the motion to suppress was denied, Erwin entered into a plea agreement that allowed him to appeal from the district court decisions denying his motion to suppress as well as his motion to correct improper assignment of indictment. On June 28, 1994, Erwin was

sentenced to a 264-month prison term. Erwin's timely appeal followed.

II.

[1] In his first assignment of error, Erwin contends that the district court violated a clear legal duty to correct the improper assignment of the case to the Northern Division after the return of the indictment. As a basis for his argument, he cites the Local Rules of the Eastern District of Michigan. However, because the Bay City (Northern Division) and Flint (Southern Division) courthouses are both located within the Eastern District of Michigan, Erwin has no constitutional or statutory right to venue in Flint. *United States v. Truglio,* 731 F.2d 1123, 1130 (4th Cir.1984); *United States v. Balistrieri,* 778 F.2d 1226, 1229 (7th Cir.1985), *cert denied, Balistrieri v. United States,* 477 U.S. 908, 106 S.Ct. 3284, 91 L.Ed.2d 573 (1986); *United States v. Rosier,* 623 F.Supp. 98, 99 (W.D.Mo.1985). Accordingly, Erwin must establish that the district court abused its discretion in refusing to transfer the case from Bay City to Flint. *Truglio,* 731 F.2d at 1130.

[2] Rule 18 of the Federal Rules of Criminal Procedure provides that each prosecution must occur "in a district in which the offense was committed." Furthermore, "[t]he trial court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice." *Id.* According to the notes accompanying Rule 18, a 1966 amendment eliminated a previous requirement that the prosecution shall be in a division in which the offense was committed and distinctly vested discretion in the court to fix the place of trial at any place within the district with due regard to the convenience of the defendant and the witnesses. There has been no allegation by Erwin that the trial in Bay City

(Northern Division) inconvenienced either himself or the witnesses, or that it delayed the administration of justice. Erwin has alleged, on the other hand, that the prosecution engaged in judge-shopping by trying the case in the division in which the six-count indictment was returned. This allegation is directed toward the prosecution rather than the district judge; consequently, it is an insufficient basis for reversing the district court's decision. For this reason, and because five of the six offenses were committed within the area encompassed by the Northern Division, we find that the district court did not abuse its discretion in holding the trial in the Northern Division of the Eastern District of Michigan.

III.

[3, 4] In his second assignment of error, Erwin contends that the district court erred in denying his motion to suppress the cocaine that was discovered as a result of the July 31 search of Erwin's car on the basis that the deputies exceeded their authority to detain Erwin and search his vehicle after the suspicion that gave rise to the initial stop had been resolved. When reviewing the denial of a motion to suppress evidence, the appellate court must consider the evidence in the light most favorable to the government. *United States v. Williams,* 962 F.2d 1218, 1221 (6th Cir.), *cert. denied,* 506 U.S. 892, 113 S.Ct. 264, 121 L.Ed£d 194 (1992). This Court applies the clearly erroneous standard to findings of fact when reviewing the ruling of a district court on a motion to suppress, but reviews conclusions of law *de nova. Id.*

[5-7] *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), permits a "stop and frisk" by police where the stop is based on specific, articulable facts indicating reasonable suspicion that a crime has been committed. I& at 21, 88 S.Ct. at 187980. Furthermore, the scope of activities

permitted during an investigative stop is determined by the circumstances that initially justified the stop. *United States v. Obasa,* 15 F.3d 603, 607 (6th Cir.1994); *United States v. Sharpe,* 470 U.S. 675, 682, 105 S.Ct. 1568, 1573, 84 L.Ed£d 605 (1985). Once those circumstances are resolved, the detainee must be released. *Obasa,* 15 F.3d at 607, *quoting Berkemer v. McCarty,* 468 U.S. 420, 439--40, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984).

[8] Deputy Wagner's testimony at the suppression hearing reveals that shortly after stopping Erwin, Wagner was standing two feet from Erwin and failed to detect alcohol on his breath. Wagner did not conduct a sobriety test. Furthermore, a visual observation of Erwin failed to reveal glazed eyes, slurred speech, dilated pupils or any of the numerous signs indicating that Erwin may have been under the influence of narcotics or alcohol. According to Wagner's testimony, it was Erwin's nervous demeanor that justified Wagner's continued detention and investigation despite Wagner's experience, as testified, that it is not uncommon for innocent people to get nervous in the presence of police officers.

The lack of evidence regarding Erwin's possible intoxication is corroborated by Deputy Lawry's testimony. Although Lawry confirmed Wagner's assessment as to Erwin's nervous demeanor, he testified that Erwin was coherent, lucid and did not exhibit "any characteristics" of intoxication. When asked whether he thought Erwin was under the influence of narcotics at the time, Lawry responded,

> As far as controlled substances, I thought possibly due to the, what I believed to be, narcotics paraphernalia and his original nervous demeanor, but in speaking to him and observing him, he didn'the was very cognizant of what was going on and aware of what was happening.

Transcript of Motion Hearing, p. 87, Record, p. 111.[2] As the district judge stated at page 16 in his Memorandum Opinion and Order, Deputy Lawry (sic) was watching the reactions of the defendant and by this time noted that he did not appear to be intoxicated or under the obvious influence of any drug, that he seemed awake and aware, that he seemed of reasonable intelligence, and that he seemed to know what was going on.

Record, p. 35.

Thus, construing the evidence in a light most favorable to the government, the facts show that Erwin displayed no signs of being under the influence of either alcohol or drugs. He was sweating and appeared nervous, which is not particularly unusual for someone stopped by police officers in the middle of summer. As noted heretofore, the scope of activities permitted during an investigative stop is determined by the circumstances that initially justified the stop. The circumstance initially justifying this particular stop was the possibility of intoxication by a person operating a motor vehicle. Once the officers satisfied themselves that Erwin was not operating his vehicle under the influence of alcohol or narcotics, Erwin should have been released. The record shows that the police officers made this determination *before* they obtained additional information that may, or may not, have provided a basis for further inquiry. Consequently, the evidence seized thereafter was obtained improperly and should have been suppressed.

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[2] The narcotics paraphernalia Deputy Lawry referenced were a cellular telephone, a mirror and a blackhead remover, mistakenly thought to be a coke spoon, that he allegedly saw in the front seat of Erwin's car when he walked up to Erwin to perform the pat down search.

Interestingly, the Ohio Supreme Court reached the same conclusion that the majority reaches here in *State v. Robinette,* 73 Ohio St.3d 650, 653 N.E.2d 695 (1995).[3] In *Robinette*, a

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[3] Moreover, in a unanimous opinion in *State v. Mays,* 172 W.Va. 486, 307 S.E.2d 655 (1983), the Supreme Court of Appeals of West Virginia adopted the *"free* to go" rule. It held:

> ... By establishing a clear rule that police investigatory interrogations without presentment to a magistrate are allowable only when the suspect is expressly informed that he is not under arrest, is not obligated to answer any questions and is free to go, we hope to establish a system sufficiently flexible that the innocent are allowed to prove their blamelessness and the police are able effectively and legally to interrogate those who are ultimately proven guilty.

307 S.E.2d at 658. The Supreme Court of Appeals of West Virginia decided *State v. Jones,* 193 W.Va. 378, 456 S.E.2d 459 on March 6, 1995.

> This decision seeks to clarify the law in West Virginia. By today's decision, we recognize the "no seizure" notion justifying brief police citizen encounters irrespective of reasonable suspicion. Any further questioning, i.e., investigative interrogation, would have to be either justified by *Terry-type* suspicion or accompanied by the *"free* to go, etc." *Mays* warning, the latter ensuring the voluntariness of the encounter. Involuntary detention, like that which occurred in *Mays* and in this case, would amount to an arrest requiring probable cause and compliance with the prompt presentment standards.

456 S.E.2d at 467 n. 17.

deputy sheriff stopped the defendant for driving his car in excess of the posted speed limit. After returning the defendant's driver's license, the deputy asked him whether he could search the car. The defendant consented and was arrested for possession of a small amount of drugs. The majority of the Ohio Supreme Court stated it was

> ... convinced that the right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation ....
>
> ... [W]e do not believe that this legality [of consensual encounters between police and citizens] should be used by police officers to turn a routine traffic stop into a fishing expedition for unrelated criminal activity ....

73 Ohio St.3d at 655, 653 N.E.2d 695.

The majority opinion in *Robinette* further declared that in future traffic stops,

> [a]ny [police] attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

Id, However, the majority in the case *sub judice* does not choose to go as far as the Ohio Supreme Court did in *Robinette*. "The endless variations in the facts and circumstances' of cases raising the issue make a brightline test impracticable." *Obasa,* 15 F.3d at 607, *quoting Florida v. Royer,* 460 U.S. 491, 506, 103 S.Ct. 1319, 1329, 75 L.Ed.2d 229, 242 (1983). Rather, a court should analyze the scope of activities permitted during a valid detention in light of the

circumstances that initially justified the stop. After the traffic matter was concluded in the instant case, the defendant-appellant should have been released.

IV.

For the foregoing *reasons,* the district court's order denying Erwin's motion to correct improper assignment is AFFIRMED; and the district court's order denying Erwin's motion to suppress is REVERSED. The case is hereby REMANDED for further proceedings.

RYAN, Circuit Judge, dissenting.

In my judgment, the majority opinion fails to identify the correct issue in this case, on, its facts essential to a correct resolution of the real issue, and announces a rule of law wholly foreign, until today, to established Fourth Amendment jurisprudence. I respectfully dissent.

The issue we are required to decide is whether the defendant's consent to search his vehicle was freely and voluntarily given. The majority opinion never addresses this issue. Instead, it holds, without supporting authority, that once the circumstances justifying an initial Terry stop are resolved, the suspect must be released. Indeed, the authority cited in support of this novel view contradicts it. Had the majority opinion taken into account all of the facts relevant to the real issue in the case whether the defendant voluntarily consented to the search of his vehicle it may well have avoided the erroneous conclusion it reaches.

II.

The facts are all important.

Deputy Sheriff Jeffrey Wagner of the Livingston County, Michigan, Sheriffs Department initially approached the defendant, James Erwin, Jr., because Erwin was standing in a truck step, near a pay telephone, and next to a vehicle which matched the description of one identified in a police radio dispatch as possibly being operated by a drunk and/or reckless driver.

Deputy Wagner testified that as he approached Erwin, the defendant seemed to be attempting to get back into his vehicle as ff to leave. Wagner asked Erwin to remain where he was and explained that he was investigating a drunk and/or reckless driving report involving someone driving a vehicle whose description matched Erwin's. During this brief exchange, Wagner noted that Erwin seemed extremely nervous, he was sweating, rubbing his hands together, taking his hat off and putting it back on again several times, and wiping his brows. He also noticed a cellular phone on the front seat and observed that the back seat cushion was "slightly ajar."

The deputy asked Erwin for his driver's license, which the defendant produced. However, the defendant did not have a registration for the vehicle or proof of insurance because, he claimed, he had borrowed the vehicle from someone else and, in all events, the vehicle had been rented. A radio lien check on Erwin's license revealed that Erwin had "several" prior convictions for weapons and drug offenses, and had recently been released from a parole status. While Wagner was running the check on Erwin's license, Deputy Sheriff Michael Lawry arrived on the scene. Lawry noticed that Erwin was "sweating profusely," his eyes were "darting around," and he was continually "reaching into his pocket."

Lawry approached Erwin, patted him down for weapons,

and discovered that Erwin was carrying a pager, between $800 and $900 in cash, and $135 in food stamps. Initial questioning revealed that Erwin was not intoxicated, and it did not appear that he was under the influence of drugs. However, the deputies suspected that Erwin might be a drug distributor. They reached that conclusion, the deputies said, because of the combination of the cellular phone, the pager, the nearby public phone, the large amount of cash, the out-of-place back seat cushion, a small mirror and an open cloth case on the front seat of the vehicle which the deputies suspected, mistakenly it turned out, was a "coke spoon," the defendant's criminal background, the suspicious absence of the vehicle registration and proof of insurance, and the defendant's "extremely nervous" demeanor; all articulable facts pointing to a reasonable suspicion of criminal activity.

At this point the deputies decided to question Erwin further and asked him whether he had anything in the vehicle he shouldn't have, like weapons or drugs, to which the defendant responded that he did not. Deputy Lawry then said: "Well, then, you don't mind if I look around in the car then, do you, or would you?" Erwin responded that he would not mind. Deputy Lawry testified that the back seat cushion came forward with "minimal" effort. Behind the cushion, he found the package of cocaine at issue in this case.

At the suppression hearing, the district court credited the deputy's testimony and found that Erwin's consent to search the vehicle was freely and voluntarily given.

III.

A threshold issue is whether the police had a reasonable basis for detaining Erwin at all. The record contains ample evidence to justify the deputies in detaining and questioning

Erwin, based upon the reasonable, articulable suspicion of drunk or reckless driving derived from the police radio dispatch information. Terry v. Ohio, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877-79, 20 L.Ed.2d 889 (1968). Police are generally justified in stopping an individual and asking for identification when relying on information transmitted by a valid police bulletin. *See United States v. Hensey*, 469 U.S. 221, 232, 105 S.Ct. 675, 682, 83 L.Ed.2d 604 (1985).

Although the majority opinion does not dispute the lawfulness of the initial detention of Erwin for questioning, it concludes, under the authority of *Terry*, that the deputies were not permitted to *continue* questioning Erwin once the *initial* reasonable suspicions that justified the stop were dispelled. The majority places great weight on the fact that Erwin was not in fact intoxicated. However, under *Terry*, officers are justified in posing questions to a person they lawfully stop and in detaining him briefly while attempting to obtain further information. Id. Simply put, there is no constitutional rule of law that proscribes detention for further questioning once the justification for the initial *Terry* stop is satisfied. That, of course, is particularly so where there is a reasonable, articuable basis to suspect criminal activity other than that for which the original stop was made. As in all Fourth Amendment inquiries, the test is one of reasonableness. The question to be asked is whether "'the facts available to the officer at the moment of the seizure ... warrant a man of reasonable caution in the belief' that the action taken was appropriate?'" *Id.* at 233, 105 S.Ct. at 682. The concept of "reasonable suspicion" is not "readily, or even usefully, reduced to a neat set of legal rules.'" *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) (citation omitted). Rather, the validity and scope of the stop depend upon the totality of the circumstances. Id. at 8, 109 S.Ct. at 1585-86.

Although any *one* of the factors taken into account by the deputies, considered separately, might well be consistent with innocent behavior, taken together, they justify, at the very least, a reasonable suspicion that Erwin was engaged in criminal activity. *See id* at 9, 109 S.Ct. at 1586. But even assuming that all the factors with which the deputies were faced did not amount to articulable facts pointing to a reasonable suspicion, there were, nonetheless, ample grounds to ask Erwin if he would consent to a search of his vehicle. A law enforcement officer does not violate the Fourth Amendment merely by approaching an individual, even when there is no reasonable suspicion that crime is afoot, and asking him whether he is willing to answer some questions. *Florida v. Royer,* 460 U.S. 491, 497, 103 S.Ct. 1319, 1323-24, 75 L.Ed.2d 229 (1983). The Constitution does not prohibit a law enforcement officer from engaging an individual in conversation; and that is not less so when the conversation includes a request for consent to conduct a search of the individual or his vehicle. *United States v. Dunson, 940* F.2d 989, 993-94 (6th Cir.1991) (citing *Berkemer v. McCarty,* 468 U.S. 420, 435-42, 104 S.Ct. 3138, 3147-52, 82 L.Ed.2d 3i7 (1984)), *cert. denied,* 503 U.S. 941, 112 S.Ct. 1488, 117 L.Ed.2d 629 (1992). "The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." *Florida v. Bostick,* 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 L.Ed.2d 389 (1991).

IV.

Because the search of defendant's car was not preceded by an impermissible seizure under the Fourth Amendment, Erwin's consent, ff freely and voluntarily given, would have entirely justified the search of the vehicle. *United States v. Mendenhall,* 446 U.S. 544, 558, 100 S.Ct. 1870, 1879, 64

L.Ed.2d 497 (1980). The question of voluntary consent is one of fact to be determined by the totality of the circumstance and will not be reversed unless clearly erroneous. *United States v. Winfrey,* 915 F.2d 212, 218 (6th Cir. 1990), *cert. denied,* 498 U.S. 1039, 111 S.Ct. 709, 112 L.Ed.2d 698 (1991); *United States v. Rose,* 889 F£d 1490, 1494 (6th Cir.1989).

The majority opinion does not consider whether consent was freely and voluntarily given because it concludes that once the circumstances justifying the initial stop were resolved, Erwin had to be released. Majority op. at 221 (citing *United States v. Obasa,* 15 F.3d 603, 607 (6th Cir.1994)). There is simply no authority to support such a narrow black-letter rule. *Obasa,* the case cited in the majority opinion, does not support the majority's new rule. To the contrary, *Obasa* specifically holds that:

> When police actions go beyond checking out the suspicious circumstances that led to the original stop, the detention becomes an arrest that must be supported by probable cause .... *Nevertheless, ... there is no "litmus-paper test ... for determining when a seizure exceeds the bounds of an investigative stop."* ... The "endless variations in the facts and circumstances" of cases raising the issue *make a bright-line test impracticable .... IT]here can be no rigid time limit for a permissible Terry stop.*

Obasa, 15 F.3d at 607 (emphasis added) (quoting *Royer,* 460 U.S. at 506, 103 S.Ct. at 1329). Thus, the *per se rule* announced in the majority opinion is directly contradicted by the case cited as authority. As additional support for the novel rule it establishes today, the majority opinion cites a footnote

statement in a West Virginia Supreme Court of Appeals case [1] decided under the West Virginia Constitution, and a decision of the Ohio Supreme Court[2] which establishes a new warning police officers must give to persons stopped for traffic violations in Ohio before "an officer attempts to engage in a consensual] interrogation." I agree with the statement in the majority opinion that both decisions are "interesting[ ]," but manifestly, neither is Fourth Amendment authority in this circuit.

There is simply *no* rigid time or scope against which to measure a valid *Terry* stop. *See, e.g., Sharpe,* 470 U.S. at 685, 105 S.Ct. at 1575; *Obaso,* 15 F.3d at 607, and, under the Fourth Amendment, no arbitrary point beyond which an officer may not request permission to conduct a vehicle search. The voluntariness of Erwin's consent is the real issue in this case the one framed in the parties' briefs and argued at oral argument and it should have been resolved in the majority opinion.

Erwin argues that he was not asked whether he would consent to a search of his vehicle, but rather that he "acquiesced" to the deputy's "statement" about whether he could search his vehicle. The trial court's finding of fact was otherwise.

A consent search is a standard law enforcement

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[1] *I. State v. Jones,* 193 W.Va. 378, 456 S.E.2d 459., 466-67 n.17 (1995).

[2] *State v. Robinette,* 73 Ohio St.3d 650, 653 N.E.2d 695, 699 (1995).

investigatory technique. *Schneckloth v. Bustamonte,* 412 U.S. 218, 231-32, 93 S.Ct. 2041, 2049-50, 36 L.Ed.2d 854 (1973). The voluntariness of a consent to search is not affected by the consenter's knowledge that he has a right to refuse to consent. *Id.* at 234, 93 S.Ct. at 2051. Although, whether the suspect was informed of his right to refuse consent is one of the many factors to consider in determining the voluntariness of the consent, the police are under no legal obligation to inform a suspect of his right to refuse consent. "[Ill would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning." *Id.* at 231, 93 S.Ct. at 2050.

Here, the district court conducted an exhaustive examination of the evidence, carefully assessed the credibility of the witnesses, and found that Erwin "took a chance, gave a knowing consent, but lost the gamble." On issues of voluntariness, the trial court's finding "represents the last word unless it is clearly erroneous." *Dunson,* 940 F.2d at 994. A finding by the district court is clearly erroneous when, although there is evidence to support it, the reviewing court, upon examination of the record, is left with a definite and firm conviction that a mistake has been committed. *United States v. Tillman, 963* F.2d 137, 143 (6th Cir.1992).

There is no evidence that the deputy threatened Erwin or coerced him in any way, and Erwin does not claim that he misunderstood the deputy's question. As the district court found, Erwin's consent was unequivocal and specific: "No," he didn't mind. There is no basis in the record to conclude that the district court clearly erred in finding that Erwin freely and voluntarily consented to the search of his vehicle.

The rule announced in the majority opinion effectively alters, and is wholly inconsistent with, *Terry* and its progeny.

The logical application of the majority's novel new rule means that from now on law enforcement officers may not even detain a driver long enough to run a lien check on a suspect's driver's license after making a valid *Terry* stop, ff the *original* purpose for which the driver was stopped is satisfied.

I respectfully dissent.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	**Case No.**
	)	**93-CR-20027-BC**
JAMES ERWIN, JR.,	)	
Defendant.	)	
_____/		

February 4, 1994

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

The defendant has moved to suppress physical evidence seized during a warrantless search of a vehicle operated by defendant, and during the execution of two search warrants about two months earlier. He also moves to suppress certain statements attributed to him as made after his arrest in the encounter with police officers at the scene of the automobile search. The court has reviewed the affidavits supporting the search warrants and heard the testimony of Deputies Hawry and Wagner, officers who dealt with the defendant at the scene of the automobile search, Officer Smith who talked with

the defendant after the arrest, and Sgt. Dombrowski, a supervisor who played a minor role after the search.

Search warrants were issued on two successive days in June, 1992, by a judge of Michigan's 70th Judicial District. The first of these, on June 6, 1992, was issued to search the house of defendant's mother (and many other houses as well) primarily for gambling paraphernalia and other evidence of an illegal "numbers" operation in Saginaw, Michigan. The second, on June 7, 1992, was based on drugs and other things found during the gambling search, and was for a residence occupied by the defendant.

The June 6th warrant was based on extensively detailed information from confidential informants related to the district judge by a police officer affiant. Although agreeing that the twenty-six page long affidavit "identifies allegedly criminal gambling activities in detail," defendant asserts that the information as to his mother's house, at 1311 Carroll Street, was insufficient to allow it to be included in the warrant.

The June 7th warrant was far less detailed, but sought entrance into defendant's East Outer Drive house mainly on the strength of a distributable quantity of cocaine found in the same room as a suspiciously active pager bill assigned to defendant. The affidavit said that other personal papers nearby were identified with defendant, and that the East Outer Drive house was defendant's home both according to him and according to municipal records.

The court finds that both search warrants were based upon a sufficient showing of facts to establish probable cause to believe that evidence of a crime would be found at the two locations. Additionally, there is nothing to suggest anything other than good faith reliance on each warrant by the

executing officers.

Almost two months after cocaine was found at his mother's house, an automobile used by defendant was searched and about a kilogram of cocaine was located. The automobile search was done with the consent of the defendant, and the court finds that his consent was knowingly, freely and voluntarily given.

Accordingly, the defendant's motion to suppress will be denied.

II. DISCUSSION

A. Search warrant standards of review

To be valid, a search warrant must contain, on its face, sufficient information from credible sources (which may include hearsay) to allow a neutral and detached magistrate to conclude that probable cause exists to believe that the person or property to be searched or seized are at the place to be searched. The determination of probable cause is to be made by a common sense analysis of all of the information provided, taking into account the "totality of the circumstances"; such probable cause will be found if "there is a fair probability" that the contraband or evidence is at the particular place described. Illinois v. Gates, 462 U.S. 213 (1983).

This court's examination of a magistrate's finding "should not take the form of a de novo review. Indeed, a magistrate's *'determination* of probable cause should be paid great deference by reviewing courts'" 462 U.S. at 236, (quoting Spinelli v. United States, 393 U.S. 410 (1964)). The Gates Court professed and reiterated the longstanding

clear preference for search warrants found in the Fourth Amendment, and directed lower courts to use a "substantial basis" test in reviewing the decisions of magistrates. Thus, the magistrate's determination of probable cause shall be upheld "so long as the magistrate has a 'substantial basis for conclud[ing]' that a search would uncover evidence of wrongdoing . • ." 462 U.S. at 236 (quoting, Jones v. United States, 362 U.S. 257 (1960)).

B. The Carroll Street Warrant

The defendant alleges that the search warrant affidavit contains "nothing whatever" to provide "the magistrate or others with a reasonable basis for believing that evidence of criminal activity will be found . . . at 1311 Carroll." Brief In Support of Defendant's Motion to Suppress, 3. This claim is not supported by a sensible reading of the information contained in the affidavit, which demonstrates that a locally widespread gambling operation had been under surveillance for several months.

The gambling operation was described in great detail by a confidential informant who spoke with direct personal knowledge, and who drove around the city in the company of an officer pointing out various places which were involved in the operation. Included in the gambling was a system of collecting and recording bets, and making payoffs, using automobiles and other vehicles which would travel from place to place making appointed rounds on an observable schedule. The house at 1311 Carroll was one of the many places pointed

out by the informant[3] . Police surveillance showed that suspect vehicles made regular trips to the 1311 Carroll address on at least three occasions: May 12, May 21 and May 29, 1992. Each trip was in the evening. Trip $1 was at 6:40 p.m., trip $2 at 6:41 p.m. and trip #3 at 6:52 p.m. A person went from vehicle to house, and to vehicle again on each of these occasions, with the time inside the house being eight minutes, four minutes and one minute in duration respectively. The people driving to the Carroll Street address made that house only one of many stops along a route which was followed on many occasions. The pattern was consistent: drive up to a house, go inside for a few minutes, return to the car and go to the next house in a different neighborhood, stay for a few minutes, return to the car and go on to the next house, and so on.

"Maddie" Erwin, a worker in the gambling organization, was said to have resided at "1103" Carroll (a non-existent address). Elsewhere there are references to a "Mattie" Erwin and to the address sought to be searched, 1311 Carroll. Defendant seizes upon these two discrepancies

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[3]The "1311" address was erroneously recorded in paragraphs "F" and "X" of the affidavit as "1103," a number which the government asserts (and the defendant does not contest) is non-existent in Saginaw. In the affidavit's description of "places to be searched," there were two places targeted on Carroll: 1311 and 1320. No address on any other street mentioned in the affidavit corresponds to the number "1103." Ail other Carroll Street address references in the affidavit appear to be written accurately. From all this, it seems clear to the court that "1103" is a transpositional or clerical error.

to suggest that there was a failure of probable cause. The court does not agree.

There was a substantial basis for the magistrate to conclude that gambling paraphernalia would "probably" be found at 1311, the proper Carroll Street address. The difference between the names "Maddie" and "Mattie" is inconsequential. The 'affiant could just as well and quite truthfully have referred to the suspect as "a woman named Erwin, whose first name begins with M and sounds like Hattie." The affidavit would be no more nor less reliable. The magistrate was entitled to conclude that the reference was to the same person, if he indeed even noticed the small spelling difference.. The fact that "1103" Carroll does not exist in a city would be something which officers of that city should know, and its mistaken inclusion should not have been overlooked, but its presence in an affidavit of this complexity and length is not unforeseeable. The government's proffered explanation is of transpositional error by a clerical worker or by one who was dictating the transcription; the syllables of "eleven-oh-three" and "thirteen-eleven" are not remarkably far apart, to the court's ear, and the explanation seems likely. But whatever the source of the mistaken address, the question is whether it should have prevented the magistrate from determining that probable cause existed. The court rules that it did not. The first appearance of "1103" is in paragraph "F,"wherein "Maddie" Erwin is described as a worker, and the address is said to be a "drop-off" location. The other reference is in paragraph "X," where "1103" was given in a long list of addresses involved in the gambling conspiracy, and again said to be a "drop off" location. These references to 1103 as a drop off location are merely supplementary to the surveillance of 1311 Carroll: actual observations clearly showed that it was indeed, at least probably, involved with the gambling conspiracy. The name of the Erwin family member

'living there (or anyone else for that matter), and whether a first name is spelled "Maddie" or "Mattie," does not change those surveillance observations.

Because there existed within the four corners of %he search warrant probable cause to issue the search warrant, a detailed discussion of the principles of United States v. Leon, 468 U.S.-897 (1984), authorizing the admission of such evidence even in the absence of such probable cause, is unnecessary. The court nonetheless notes that there is a complete absence of factual basis for any other conclusion than that the officers who executed the search warrant did so in good faith reliance upon it.

C. The East Outer Drive Warrant

A warrant to search this location was issued after the Carroll Street search turned up not only evidence of gambling but also evidence of cocaine trafficking by the defendant. Powder cocaine was found hidden in a room of the house. In the same room was found a pager bill showing some 750 calls received in the course of a month, and personal documents which indicated the defendant's recent presence in the room. The East Outer Drive address was identified as a place which defendant had recently claimed to a police officer as "home;" this was during the course of a controlled substance[4] arrest

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[4] Defendant notes that the controlled substance in question was codeine cough syrup. The government says that this is true, but that the information is nonetheless accurate.

The court agrees. A recent arrest for a "controlled substance" offense can sensibly be factored into the magistrate's probable cause equation without reference to the particular variety of drug. It is within the realm of common

some weeks earlier. Courts, as well as law enforcement officers, have recognized pagers as one of the tools of the trade of drug dealers. The indication of a pager this heavily used in proximity to a quantity of cocaine and the personal papers of someone already under suspicion or arrest for a controlled substance viola=ion, provides sufficient facts for a magistrate to find probable cause to authorize a search of the suspect's home.

The principles of Leon, mentioned above, would in any event permit the court to examine the behavior of the warrantexecuting officers to determine if those officers relied upon the warrant in good faith. There is no indication here that they did otherwise because the warrant was regularly issued and on its face appears to have substance. Leon would serve to regularize any failure of probable cause that might otherwise be found.

The defendant claims that not only insufficient, but false information was provided. If there were evidence substantiating this claim, the warrant would have been issued in violation of Franks v. Delaware, 438 U.S. 154 (1978), but the court determines that there is no claim here of substance. These things are said to be false: 1) that there were not two ounces of cocaine found at Carroll Street, but only about one; 2) that the controlled substance arrest was for codeine; 3) that the controlled substance arrest was eight, not three,

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knowledge that a person willing to illegally possess one drug may at least more *probably* be willing to be involved in others as well. Standing alone, this kind of information would not go very far toward providing probable cause, but it is not irrelevant, and does not appear to this court to be misleading, as defendant would characterize it.

weeks previous; 4) that the controlled substance arrest report showed a Carroll Street address, not East Outer Drive; 5) that East Outer Drive tax records do not show James Erwin Jr., as stated in the affidavit, but rather James Erwin, Sr.

Items 2) and 4) in the affidavit do not demonstrate false statements. The arrest, as noted above, was for a "controlled substance violation." The affidavit correctly recited this fact, and the omission of the specification as to codeine is immaterial. See, note 2, above. That the arrest report shows "Carroll Street" is likewise immaterial. It is what the defendant *said* to the officer that is recited in the affidavit, not what was *recorded* in the arrest report. According to the government and unrefuted by the defendant the source of the arrest report's address for the defendant was his operator's license. Thus the statement in the affidavit concerning the defendant's verbal assertion is not inaccurate.

Items 1), 3) and 5) are conceded by the government to be "inaccurate." The government argues, though, that none of them is shown to be false, and the court agrees.

The first inaccuracy, in item 1), is of the measure of cocaine found in the Carroll Street search. "Approximately two ounces" is alleged in the warrant, while closer to one ounce was actually found in the search. This kind of quantification information, being approximate by its nature, is not capable of being totally "true" or "false." The important question, incases where quantity is a truly important issue, is how accurately the measure is stated. Under some circumstances, quantification could be so far off and thus misleading as to equate to "falsity." It would require excision *from* the affidavit and reexamination of the affidavit under Franks. Here, the actual quantity of cocaine was not. particularly important The court takes judicial notice that

cocaine is very commonly sold in quantities of less than one ounce. Even though the quantity was somewhat overstated, the presence of any cocaine in proximity to a pager used as this one was would reasonably point toward drug distribution, since such circumstances would permit such cocaine to be seen as merely the remnant of a larger amount a commercial amount. The approximation of drug quantity was, therefore, beside the point: it was the very existence of the drug which was significant. The court holds that an overstatement of drug quantity is, within these facts, sufficiently unimportant that it does not evince either the falsity or the reckless disregard for truth for which the court must be watchful under the principles of Franks.

The second of these, in item 3), concerns the timing of the prior recent arrest, and is utterly without significance within these facts. That there was such an arrest is uncontested. That it was for controlled substances is uncontested. The dispute is only that the arrest was five weeks earlier than reported in the affidavit. This is a quibble over a fairly trifling detail. Nothing here suggests that the *timing* of the earlier arrest contributed anything of substance to the legitimacy of the East Outer Drive search. Rather, the facts suggest that it was the previous day's Carroll Street search revealing, the cocaine which provided the crucial timing. The *existence* of a fairly recent previous drug arrest was, of course, of some significance. If the purported arrest had been revealed to have not occurred at all, there would be quite a different result at this phase of the inquiry.

Finally, in item 5), the affidavit stated that computerized records for the city showed that the East Outer Drive taxes were billed, to James Erwin, Jr. It is uncontested that this is not correct, and that it was the defendant's father, James Elwin, Sr. who was the person to whom such bills came. It is also uncontested, however, that those same

computerized records showed that *water* was billed to Mr. Erwin, Jr., of that same address. Moreover, this billing information was only supplementary to and supportive of the evidence of East Outer Drive residency which came from the defendant's own mouth a few weeks earlier. The difference between municipal "tax" and municipal "water" bills is not great for these purposes, and when compounded by the similarity between the names of father and son, the court is convinced that there is no indication of falsity here, nor even any evidence of a disregard for the truth, "reckless" or otherwise. It is true that the information is not strictly accurate, but it is very close to accurate, and the mistake is more in the nature of a misspelling than of anything else. Franks does not require the court to seize upon minor inaccuracies such as these and to therefore invalidate an otherwise legitimate warrant. United States v. Edwards, 994 F.2d 417, 424-425 (8th Cir. 1993) (finding that typographical error was not a "deliberate falsehood" needed to invoke a Franks hearing).

D. Consent Search Standards

The government asserts that the defendant gave consent to the search. In order to prevail on that claim, there must be clear testimony, presented by the government, which proves by a preponderance of the evidence that the defendant acted knowingly and voluntarily in giving any such consent. Bumper v North Carolina, 391 U.S. 543 (1968); United States v Matlock, 415 U.S. '164 (1974); United States v Tillman, 963 F.2d 137 (6th Cir. 1992). Once consent is shown to have been freely and voluntarily given, there is no need to consider whether probable cause existed. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (consent is an "exception[] to the requirements of both a warrant and probable cause") .

E. The Search of the Automobile; Statements of the Defendant

On the evening of July 31, 1992, the defendant was approached by police officers who knew nothing of these earlier searches. Acting on a citizen complaint about erratic possibly drunk driving in a car which resembled the one with which Mr. Erwin was associated, Deputy Wagner approached the defendant where his car was parked near a pay phone in "The Oasis," a large truck stop. Deputy Hawry arrived to back up the first officer. Hawry eventually searched the car, and it is the circumstances of this search which are the subject of dispute. Deputy Hawry testified from a base of considerable law enforcement experience, having been an officer for more than fifteen years in Detroit and in Livingston County. His demeanor was positive and confident, and although he was somewhat argumentative when being questioned by defense counsel, the court finds that his testimony is worthy of credit. Wagner's testimony likewise was direct and persuasive, and the
court credits him as well.

On the evening of the encounter with defendant, Wagner and Hawry knew that a radio broadcast had cautioned officers that the defendant had been arrested for "several" narcotics and concealed weapons offenses, thus justifying an "officer safety alert." They learned that the defendant had been recently released from a parole status, this information signifying that he had been convicted of an offense sufficiently serious to justify the state prison sentence which must have preceded parole. Upon seeing the defendant, Wagner and Hawry had both noted that he was sweating "profusely" and seemed nervous (described as either "extremely" or "somewhat"). 'He was rubbing his hands together, putting them in and out of his pockets, taking his hat off and putting

it back on, and wiping his brow. Atop his jogging suit, the defendant was wearing a generous quantity of what appeared to be expensive gold jewelry at the time, but the automobile he was driving was a rather plain, non-luxury model which he had told the deputies was a rental car he had "borrowed." There was a cellular telephone visible on the front seat of his car, but the defendant appeared to have been using a public pay phone as Deputy Wagner arrived in the parking lot. When Deputy Hawry patted the defendant down for weapons, he found that defendant was carrying a pager, between eight and nine hundred dollars in cash and about $135 in food stamps. While the defendant did not appear or smell as though he was intoxicated by the use of alcohol, the 'deputies were reserving opinion as to whether there might have been some form of drug intoxication. None, however, seemed obvious.

All of this, to Deputy Hawry, seemed incongruous and suspicious. The officers were entitled to conclude that they may have found a drug distributor, displaying his success and "wealth" in the form of ostentatious jewelry, who had received a page and parked his non-forfeitable rental car near a public pay phone to make a non-interceptable call, rather than broadcasting the details of his drug deal over the airwaves with the cellular phone on his car seat. Convicted of multiple serious offenses and recently released from parole, the very nervous man in the jogging suit was possessed of nearly a $1,000 in cash or readily-convertible food chits, any part of which could have been the proceeds of the day's drug sales.

The deputies' suspicion of criminality was not the only possible construction of the facts, of course. As counsel for the defendant several times reminded the witnesses in cross examination, "there is nothing illegal about possessing a pager," and "nothing illegal about wearing gold jewelry."

Thus, innocent explanations are possible.[5] It appears to the court, however, as it appeared to the deputies at the Oasis: the facts were at least sufficient to spell out a reasonable suspicion of criminal activity afoot involving the defendant.

As noted, when the deputy observed the defendant's car from the outside, he could see that there was a black, leatherlike case on the front seat, with what appeared to be a

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[5] Logically following defense counsel's suggestions is the possibility that, from the perspective of the deputies' observations, the person they encountered in the parking lot may not have been a drug dealer at all, but an ordinary person of sufficient means to collect an array of gold necklaces and rings, who was driving around in exercise clothes, perhaps returning from a health club somewhere. One would still wonder, of course, why he was so nervously fidgeting and sweating upon being approached by a sheriff's deputy, why he was driving a borrowed rental car, and why he was using a pay phone rather than the cellular phone in the car. And to provide a cogent innocent explanation for the additional things known to the officers the computer check showing multiple felony arrests and convictions and the defendant's pocketful of food stamps in addition to "a wad" of cash present an even more
difficult challenge. Protesting as he does, defendant misses an important point: police officers may take proportionate investigative action upon acquiring reasonable, articulable suspicion of *criminal* behavior. Nothing requires them to consider, let alone credit, a possibility-of-innocence scenario before taking the next step in their inquiry. Thus, the indisputable fact that *innocent* explanations lie at the end of at some investigations is, basically, irrelevant.

mirror, a "coke spoon,"[6] and a portable cellular phone. He could also see that the backrest portion of the *rear* seat was ajar, appearing to have been lifted off its supports and not completely replaced.

The defendant was not under arrest at this time, and the deputy questioned him: how much cash do you have? the defendant didn't know. Whose paraphernalia is in the front seat of the car? The defendant didn't know. Do you have anything in the car that you shouldn't have, like guns or dope? The defendant said no. The deputy then said basically the following: "well, then, you wouldn't mind if I looked around in the car, would you?"The defendant responded with something like "no," or "go ahead."The deputy had no written consent-to-search forms with him at this time, thus had to content himself with verbal permission.

Deputy Hawry was watching the reactions of the defendant and by this time noted that he did not appear to be intoxicated or under the obvious influence of any drug, that he seemed awake and aware, that he seemed of reasonable intelligence, and that he seemed to know what was going on. His responses were rational, according to the deputy. The deputy was very aware that he might find drugs upon

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[6] This appears to have been a "blackhead extractor" similar to the ones available at the cosmetics department of a drugstore. Nonetheless, the deputy's testimony was uncontradicted that, from the outside of the car, it was of a size and spoon-like shape which gave it the appearance of the very small spoons he had known to be commonly used by cocaine snorters, especially when viewed in proximity to a small mirror, a preparation surface commonly used in conjunction with powder cocaine.

searching, and this was, of course, why he was interested in searching in the first place. When Hawry was asked if he had requested permission to search in other similar encounters with people who were later determined to be in guilty possession of drugs, the deputy said he had. He said that it was not unusual to find a guilty person consenting to a search in a kind of "crapshoot" with the police officer, betting on the chance that the drugs will escape notice or, even better, that the officer will relent from a search altogether, being convinced by the apparent good faith of the suspect. The officer concluded that the defendant had consented to this request for permission to search, and he proceeded.

After perusing the front seat area, the deputy moved the rear seat back cushion, pulling it forward with "minimal effort." Behind the seat he found a small paper bag with a brick-shaped object wrapped in electrical tape. This he instantly recognized as a common method for packaging cocaine. He directed the defendant to be placed under arrest.

Between the back seat and the trunk there was a tarpaper-type barrier with a small hole in it, and the deputy tried in vain to peer through it. He requested, the key to the trunk from the defendant, but the defendant was by this time not very cooperative. After unsuccessfully trying every one of the twenty or so keys on the key ring he had found on the defendant, he tried enlarging the hole some by poking at it with a pen or pencil. He could see nothing. The deputy finally located the trunk key in the defendant's shoe or sock, but there was nothing important found in the trunk.

Defendant attempted to demonstrate that Deputy Hawry had told a supervisor, Sgt. Dombrowski, that he had reached through the hole behind the seat and into the trunk to retrieve the cocaine. Hawry denied saying this, even though

such a rendition appeared in Dombrowski's written report. On the stand, Dombrowski refused to testify that Hawry had given him exactly that explanation. He wrote his report in that way because, he said, he had gotten that *impression* from the way Hawry had described the search and the condition of the car in a phone conversation. Hawry had told him about the car, the seat back, the hole, the cocaine, and asked about the need for and expense of impounding this rental automobile. It was his interpretation of where the cocaine had been found which Dombrowski recorded, not Hawry's statement.

Additionally on these facts related to consent and the location of the bag, Deputy Wagner witnessed the discussion with the defendant and later saw Hawry retrieve the bag with the cocaine. As to the consent, Wagner said that the defendant was, although nervous, also rational and of reasonable intelligence. He remembered the defendant saying something like "go ahead, search" when Hawry asked him. When Hawry went to the rear seat area, Wagner, from outside, saw the seat moved forward with very little effort on Hawry's part (it "more or less fell off"), and saw Hawry then reach behind the seat and come up with the white paper bag "almost immediately." These observations, made by a credible witness, are utterly inconsistent with a defense theory that the bag had been hidden away in the trunk, and that Hawry saw it, determined that it was of interest and only then reached for it and dragged it through a relatively small hole in the tarpaper barrier.

There is further support for the government's position found in two specific recollections from another officer, Russell Smith, who was called in to interview the defendant with regard to his willingness to provide information for other investigations now that he had been caught with cocaine. This officer was specialized in drug investigation duties, and was

neither on the scene when the search was conducted, nor connected with the deputies' employer, the county sheriff. The two Smith recollections are these: 1) when he was being briefed, Smith was told by Hawry that the defendant had given consent.[7] 2) the defendant was asked by Smith if he had given consent for the search, and if he had been' read his *Miranda* rights. To both of these questions Smith said the defendant replied "yeah."' The defendant argues that the statements attributed to the defendant should not be considered by the court in this analysis. The statements were drawn out by Smith in violation of Miranda v Arizona, 384 U.S. 436 (1966), defendant argues, since he did not knowingly and intelligently waive his right to remain silent. The court notes that the government has not replied to the defendant's supplemental brief on this point. The court determines that the use of these statements for the purpose of this analysis is unnecessary, and will reserve ruling with finality on these post-arrest statements unless and until the issue is fully briefed. The statement attributed to Hawry, however, is legitimately considered.

Finally, it was stipulated for the purpose of this hearing that the defendant has been arrested thirteen times and convicted of six serious offenses.

The defendant, while presenting no contradictory evidence, argues that Hawry, Smith and Dombrowski each is lying, and that Wagner is hedging, teetering just at the brink of perjury. The court thinks that these suggestions are groundless.

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[7] The statement was objected to as hearsay, but it is not because it rebutted the defendant's theory of recent fabrication by Hawry. F.R.E. 801 (d) (1) (B).

The court finds that the "knowing and intelligent consent" argued by the government has been proven by a preponderance, with evidence that is clear and convincing.

Defense counsel argues that voluntary consentby a guilty party defies logic: a person who knows that the drugs are there must also know that they will be found. Conversely, counsel says that if the consent is legitimate, this would conclusively show the absence of guilty knowledge. Any other result would be absurd, counsel's argument says. This argument, of course, presumes that all persons act with rationality approaching perfection, with a clear view of the immediate future, and within the logical constructs familiar to most attorneys and judges.

With this argument the court does not agree. On balance, the court believes that Deputy Hawry's observations concerning encounters with many other suspects are very likely true in this case: the defendant seems to have been a person making an entirely understandable decision, granting a consent to search while simply risking the odds against him. From the considerable base of criminal justice experience available to the defendant, the court finds that he is well experienced in encounters with the police, and is better able than most citizens of equal age and intelligence to understand what an officer means when he says "you don't mind if I look around in your car, do you?" The defendant was not threatened and nothing about the atmosphere was coercive from the perspective of a rational person. Although occurring in the evening hours, it was also July, thus daylight prevailed at the time of the encounter.

The deputies had not filled the defendant in on all the details they already knew, *nor* should they have. The defendant hadno good way to gauge the reaction of these

officers to his nervous appearance and the other circumstances of that evening; he thus had no clear understanding of just *how* suspicious they were of him. The evidence suggests to the court that the defendant made his decision to consent while hoping, without being sure, that he may have secured the back seat just well enough, or pushed the cocaine just far enough out of sight, or even that perhaps the very act of him giving consent might convince these officers that they had better things to do than search his car.

He took a chance, gave a knowing consent, but lost the gamble. The risk he took was one which a judge or lawyer in equivalent circumstances would probably not. But, people do sometimes make decisions that they later regard as unwise, and which they intensely regret. None of this equates Mr. Erwin's decision to an absurdity, though, and from the result of his decision the court will not extricate him.[8] United States

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[8] One theory of defendant's in this regard is that hiding the trunk key in his sock demonstrates conclusively that he was being uncooperative and could not be seen as voluntarily consenting. The court agrees that the hidden key is something of a cipher, but believes that the defendant's theory ignores the fact that a person can be cooperative at one point and then change his attitude, sometimes shortly thereafter. The defendant's true motivation for hiding the trunk key (or at least refusing to hand it over when requested) may be known only to him, but it appears to have come only after he was placed under arrest. The explanation may be as simple as this: the defendant, having unsuccessfully "rolled the dice" by giving consent while vainly hoping that drugs would be overlooked, decided to resist any further police overtures for cooperation. Consistent with this possibility is the defendant's noncommittal reaction to Smith's invitation to

v. Dunson, 940 F.2d 989, 994 (6th Cir. 1991) ("[Defendant's] guilty knowledge may have led him to consent to the search in the hope that the officers would content themselves with a cursory inspection of the car if he appeared cooperative. But such considerations can hardly invalidate a voluntary consent..."). United States v. Mendenhall, 446' U.S. 544, 555-556 (1.980) ("the issue is not whether' the statement was self-protective, but rather whether it was made voluntarily"); United States v. Galbreth, 846 F.2d 983, 988 (5th Cir. 1988).

The court finds that the government has met its burden of proving, by a preponderance of clear and positive evidence, that the consent was "in fact, freely and voluntarily given." Bumper v. North Carolina 391 U.S. 543, 548 (1968).

III. CONCLUSION

The defendant's motion to suppress the evidence seized pursuant to search warrants on June 6 and 7, 1992, and during the warrantless search of the vehicle operated by him is hereby DENIED.

The defendant's motion to suppress certain statements attributed to him as made after his arrest is DENIED as moot, since the court considers no evidence adduced in these

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provide information (the defendant simply said he would "think it over" and that he "had to be careful" what he said). For the reasons stated earlier in the body of this opinion, however, the court will not consider the evidence drawn from the defendant by Officer Smith.

statements in the determinations made today. This denial of the motion to suppress statements is WITHOUT PREJUDICE to the right of the government to present a briefing of the issue in the event that the government should choose to so do, and WITHOUT PREJUDICE to the right of the defendant to continue to challenge this evidence in the event that the government attempts to introduce such evidence in its case in chief.

IT IS SO ORDERED.

4, Feb. 94

/s/_____
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,)		
Plaintiff,	)	
	)	
JAMES ERWIN,	)	**Case No:**
Defendants	)	**93-CR-20027-BC**
	)	

August 30, 1993

ORDER DENYING MOTION TO CORRECT IMPROPER ASSIGNMENT OF INDICTMENT

A hearing was held on the record on August 24, 1993, on defendant's motion to correct the assignment of the case to Bay City and to confirm its earlier transfer to Flint. The Court finds that the magistrate judge acted beyond the scope of authority granted by 28 USC 636 and Local Rule 72.1(a) (2) when he accepted and relied upon the defendant's motion and transferred the criminal complaint to the Southern Division at Flint, Michigan. Therefore that transfer is declared VOID by this Court. For reasons stated on the record, the Court finds that the case is properly assigned in the Northern Division of the Eastern District of Michigan and defendant's motion to correct improper assignment of indictment is therefore

DENIED.

IT IS FURTHER ORDERED that Magistrate Judge Marc L. Goldman may proceed to issue a final appealable order on the defendant's pending motion for bond. To the extent a reference under 28 USC 636 is required for such consideration, this order shall be such a reference.

IT IS SO ORDERED.

August 30th, 1993

/s/_____
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

NOTICE TO:

AUSA Michael Hluchaniuk
Kenneth M. Mogill
Deputy U.S. Marshal
Pretrial Services
Hon. Charles E. Binder
Hon. Marc L. Goldman

APPENDIX F

UNITED STATES MAGISTRATES
28 USCS § 636

§ 636. Jurisdiction, powers, and temporary assignment
(a) Each United States magistrate serving under this chapter [28 USCS § 631 et seq.] shall have within the territorial jurisdiction prescribed by his appointment

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure [USCS FRCr PI for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 [18 USCS § 3142] concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;
(3) the power to conduct trials under section 3401, title 18, United states Code [18 USCS § 3401], in conformity with and subject to the limitations of that section, and
(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b)(1) Notwithstanding any provision of law to the contrary-

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the

court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court..4, judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the

matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title [28 USCS §§ 1 et seq.] and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts [USCS FRCP Rule 53(b)].

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary-

(l) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) [28 USCS § 631(b)(1)] and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one

judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent...

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure [USCS FRCP]. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United Stales court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

d) The practice and procedure for the trial' of cases before officers serving under this chapter [28 USCS §§ 631 et seq.], and for the taking and hearing of appeals to the district courts,

shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or Co) of this section in a judicial

district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635 [28 USCS § 635].

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code [18 USCS § 4107]. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 [18 USCS § 4108] and the appointment of counsel authorized by section 4109 of title 18, United States Code [18 USCS § 4.109], and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge 'of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit • within which such district is located. Upon recall, a magistrate may receive a salary for such service in ordnance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of a. annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 [5 USCS §§ 8331 et seq., 8401 et seq.] which are applicable to such magistrate. The requirements set forth in subsections (a),

(b)(3), and (d) of section 631, and paragraph (1) of subsection (d)of such section to the extent such paragraph requires membership of the bar of the location in which aa individual is to serve as a magistrate, shall not apply to the recall of a. retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b)) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 631.

APPENDIX G

LR 72.1 UNITED STATES MAGISTRATE JUDGES

(a) Authority of Magistrate Judges.

(1) *General.* Pursuant to 28 U.S.C. § 636(b)(4), each United States Magistrate Judge appointed by this Court is authorized to exercise all powers and perform all duties conferred upon Magistrate Judges by 28 U.S.C. § 636, as amended.

(2) *Specific Duties.* Without limitation by exclusion, each United States Magistrate Judge in this District, pursuant to (a)(1) above, may:

(A) conduct extradition proceedings, in accordance with 18 U.S.C. § 3184;

(B) direct the Probation Department of the Court to conduct a presentence investigation in any misdemeanor case;

(C) hear and determine any non-dispositive pretrial motions in civil and criminal cases, and hear and recommend the determination of any dispositive motions in such cases;

(D) exercise general supervision of civil and criminal calendars, conduct calendar and status calls, determine motions to expedite or postpone the trial of cases for the District Judges;

(E) conduct pretrial conferences, settlement conferences, and related pretrial proceedings in civil

and criminal cases;

(F) conduct arraignments in criminal cases not triable by the Magistrate Judge and take not guilty pleas in such cases;

(G) receive grand jury returns in accordance with Rule 6(f), Fed. R.Crim. P.;

(H) accept waivers of indictment, pursuant to Rule 7(b), Fed. R.Crim. P.;

(I) conduct voir dire and select petit juries for the Court, with the consent of the parties;

(J) accept petit jury verdicts in civil cases in the absence of a District Judge;

(K) conduct necessary proceedings leading to the potential revocation of probation;

(L) issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;

(M) order the exoneration or forfeiture of bonds;

(N) conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(d);

(O) conduct examinations of judgment debtors in accordance with Rule 69, Fed. R.Civ. P.;

(P) conduct proceedings for initial commitment of narcotics addicts under the Narcotic Addict Rehabilitation Act, 42 U.S.C. § 3412;

(Q) supervise proceedings conducted pursuant to letters rogatorary in accordance with 28 U.S.C. § 1782;

(R) consider and, when appropriate, grant applications of the United States to enter premises for

the purpose of seizing property or the rights to property subject to levy, pursuant to 26 U.S.C. § 6331;

(S) submit to a District Judge of the Court a report containing proposed findings of fact and recommendations for disposition by the District Judge on motions for review of default judgments;

(T) perform any additional duties not inconsistent with the Constitution and laws of the United States.

(b) Assignment of Duties to Magistrate Judges.

(1) General. A Magistrate Judge may perform any of the duties authorized above upon specific reference by a Judge of the Court or pursuant to a general order of the Court assigning duties. In performing such duties the Magistrate Judge shall conform to the general procedural rules of this Court, the instructions of the District Judge to whom the case is assigned, and the Plan for the Administration of the Magistrates System.

(2) *Prisoner Cases Under 28 U.S.C. §§ 2254, 2255 and 42 U.S.C. § 1983.* In addition to the authority granted in 28 U.S.C. § 636(b)(1)(B), Rule 10 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 8Co) of the Rules Governing Section 2255 Proceedings in the United States District Courts, a Magistrate Judge may issue any preliminary orders and conduct any necessary evidentiary or other appropriate hearings in prisoner cases under 28 U.S.C. §§ 2254, 2255 and 42 U.S.C. § 1983.

(3) *Social Security Benefits Cases.* All cases seeking review of a denial of social security benefits shall be assigned both to a District Judge and a Magistrate Judge by the Clerk of the Court at the time of filing. The Clerk shall provide for the random selection of a Magistrate Judge so that each Magistrate Judge in this District receives an equal share of all such cases from each division of the Court. The Magistrate

Judge shall determine all non-dispositive motions in such cases pursuant to 28 U.S.C. § 636(b)(1)(A) and shall file a report and recommendation in each such case pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

(c) Registry Funds. A Magistrate Judge is authorized to enter an order of the Court under 28 U.S.C. § 2042 to withdraw registry funds in any matter in which the Magistrate Judge is authorized by law to enter judgment, including but not limited to:

(1) misdemeanor and petty offense cases disposed of by a Magistrate Judge pursuant to 18 U.S.C. § 3401; 28 U.S.C. § 636(a)(3);

(2) bail release proceedings in which a Magistrate Judge has ordered bail money to be deposited into Court pursuant to 18 U.S.C. § 3141 et seq.; 28 U.S.C. § 636(a)(2); and

(3) pretrial matters referred to the Magistrate Judge for determination pursuant to 28 U.S.C. § 636(b)(1)(A).

(d) Review and Appeal.

(1) *Appeal of Non-dispositive Matters--28 U.S.C. § 636(b)(1)(A) and Rule 72(a), Fed. R. Civ. P.* Any party may appeal from a Magistrate Judge's order determining a motion or matter not dispositive of a claim or defense within the time limit set forth in Rule 72(a), Fed. R.Civ. P. unless a different time is prescribed by the Magistrate Judge or a District Judge. Such party shall file with the Clerk of the Court, and serve on the Magistrate Judge and all parties, a written objection which shall specifically designate the order, or part thereof, to which objection is made and the basis for any such objection. Any party may respond to another party's objections within 10 days after being served with a copy thereof. The form of any objections and any such response shall be in accordance with LR 7.1.

(2) *Review of Case-Dispositive Motion and Prisoner Litigations 28 U.S.C. § 636(bX1XB).* Any party may object to

a Magistrate Judge's proposed findings, recommendations or report on a matter dispositive of a claim or defense within the time limit set..forth in Rule 72(b), Fed. R.Civ. P. Such party shall file with the Clerk of the Court, and serve on the Magistrate Judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for any such objection. Any party may respond to another party's objections within 10 days after being served with a copy thereof. The form of any such response shall be in accordance with LR 7.1. [Effective January 1, 1992.]

APPENDIX H

LR 100.1 ASSIGNMENT OF JUDICIAL WORK TO PLACES OF HOLDING COURT

(a) Counties and Places of Holding Court. The judicial work of the Court is comprised of cases arising in or related to one or more of the following counties:

(1) Jackson, Lenawee, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw and Wayne counties for which the places of holding court are Detroit, Ann Arbor and Port Huron.

(2) Genesee, Lapeer, Livingston and Shiawassee counties for which the place of holding court is Flint.

(3) Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Oge* maw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw and Tuscola counties for which the place of holding court is Bay City.

(b) Civil Cases. Civil cases shall be assigned by the Clerk to a place of holding court by reference to the counties in (a) in the following order of priority:

(1) If an action is removed from State Court, the county in which the case was pending in State Court (28 U.S.C. § 1441(a)).

(2) If an action is local in nature, the county in which the real estate is located.

(3) The county in which a plaintiff resides.

(4) The county in which the claim arose.

(5) In a case in which a defendant is an officer or employee of the United States or any agency thereof acting in his or her official capacity, or under color of legal authority, or an agency of the United States, the county in which an office of a defendant is located.

(6) A county in which a defendant resides or has a place of business.

(7) The place of holding court in which the case is filed.

(c) Criminal Cases. Criminal cases shall be assigned by the Clerk to a place of holding court which serves the county in which the offense is alleged to have been committed except that criminal cases shall be assigned to Port Huron only by administrative order of the Court.

(d) Improper Assignments. A case improperly assigned to a place of holding court shall be transferred to the proper location by order of the Court. [Effective January 1, 1992.]

Committee Comment (a) No substantive change from Local Rule 7(a).

APPENDIX I

LOCAL RULES FOR CRIMINAL CASES

LR 200.1 ASSIGNMENT OF CRIMINAL CASES

Assignment of criminal cases shall be as provided in LR 100.1 and LR 100.2.
[Adopted effective July 1, 1992.]

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter [28 USCS {} 631 et seq.] shall have within the territorial jurisdiction prescribed by his appointment

> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure [USCS FRCr PI for the United States District Courts;
>
> (2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 [18 USCS § 3142] concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;
>
> (3) the power to conduct trials under section 3401, title 18, United States Code [18 U$CS § 3401], !n conformity with and subject to the limitations of that

section, and

(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b)(1) Notwithstanding any provision of law to the contrary-

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit